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Public Rights in the Navigable Streams of New York

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Chapter I.

INTRODUCTION

1. Introduction — Navigable waterways were once among the primary arteries of transportation and commerce. A substantial body of law developed in New York to help assure that rivers and streams would be accessible to perform this important public role. Today, the public's navigation use of streams is mainly recreational. This recreational use is valuable, however, not merely as an amenity enhancing the quality of life, but it also can be an important tourism resource and economic benefit to many areas of the state. The laws that regulate the public's right to pass over the state's navigable waterways have, therefore, acquired a renewed importance.

Towards the end of the nineteenth century, a practice developed among many riparian landowners to close off public access to smaller streams that had previously been open for public use. This occurred despite the fact that New York's statutory and case law have adhered consistently to the traditional common-law rule which entitles members of the public to navigate upon all streams susceptible to such use. The very persistence of the stream closing practices, however, raised ambiguities in the popular perception concerning the public's actual right to navigate through privately-owned lands.

1.1. Approach and Scope — This paper provides a comprehensive survey of the New York judicial decisions bearing on the public's right to use the state's navigable streams and waterways. The cases have been organized into a logical framework, in outline form, in order to give future researchers ready access to the relevant judicial materials. Wherever possible, the main thrust of the cases has been presented in the court's own words.[1] Brief narrative summaries of the case law are provided under the main outline headings. An attempt has been made to include a reference to

1. In quoting passages from the cases, *italics* have frequently been added to highlight key words and phrases.

every New York case relevant to public use of freshwater streams, along with a full and representative sample of cases involving lakes and tidal waters.

Federal decisions are cited sparingly. Except where they specifically involve New York law, most Federal decisions on navigation are, at best, indirectly relevant to an understanding of the common law rules that apply in New York. To be sure, congressional legislation could have a singularly major impact on the rights of the public, or anyone else, to use New York's waterways, but "until Congress intervenes in such cases and exercises its authority, the power of the States is plenary." *Hamilton v. Vicksburg, S. & P. R.R.*, 119 U.S. 280, 281 (1886).

The New York cases on the public use of tidal waters are far more numerous than those which consider public rights in freshwater streams. Even though fresh and tidal waters are subject to very different rules in questions of *ownership*, New York courts have consistently "made *no* distinction against the public right of passage and transportation." *Fulton Light , Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E. 199, 202 (1911) (emphasis added). The courts themselves tend to cite freshwater and tidal water cases indiscriminantly as authorities for one another, especially in reference to the public right of passage. Because tidal water cases add reinforcement and useful elucidation of the lines of freshwater holdings, frequent references to tidal water cases have been essential in order to present a complete picture of the New York common law applicable to the fresh waters of the state.

1.2. Summary and Conclusions — The beds of New York's freshwater streams are generally privately owned, but the courts have always recognized that the private ownership of underwater land is subject to a public right of passage along any streams that are "navigable in fact". The cases declare that the public right is an "easement" to use streams as a "highway", and they do not limit the public use to any particular purpose (such as commercial transport). When streamside owners act unilaterally to forbid public passage along navigable streams, they violate the state's long-established property interest in the stream, an interest held by the state

under a public trust for the benefit of the People.

The Legislature has the power to declare that any stream is a public highway for general use. Compensation must be paid to the private streambed owners *only* if the stream is not "navigable in fact". No compensation is required if the Legislature merely reaffirms the public's long-standing right of passage (and reasonably necessary incidental rights, such as anchoring) on the state's actually navigable streams. To ratify the public's historic rights of passage would impose no new legal burden on landowners; it only reaffirms a right or "easement" which the state has owned, in trust, all along.

Chapter II.

THE CONCEPT OF "NAVIGABILITY"

2. The Concept of "Navigability" — What counts as "navigable" waters for various legal purposes can vary considerably depending on the context. As the United States Supreme Court has observed, "any reliance upon judicial precedent must be predicated upon a careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979).

2.1 The Kinds of "Navigability" — A number of different definitions of "navigability" are recognized in New York, federal and other United States cases. Each of these definitions is applicable for a different purpose, for example, determining United States admiralty jurisdiction, fixing the reach of the federal commerce power, delimiting the so-called navigation servitude exception to the Constitution's takings clause, construing federal grants of riparian lands, interpreting state or pre-Revolution royal grants of riparian lands, and establishing the public's right of passage under state law. *See* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967); Annotation, *Public Rights of Recreational Boating, Fishing, Wading, or the Like in Inland Stream the Bed of Which is Privately Owned*, 6 A.L.R.4th 1030 (1981).

The two navigability concepts that play a key role in the New York cases are:

a. *Navigability in law*, which is based on the English common-law definition of navigable waters, i.e., those which are tidal.

b. *Navigability in fact*, which is based on the waters' actual capacity for transportation and commerce by boats, rafts, floating logs, etc.

2.2 Navigability in Law — In New York, the concept of navigability in law is used chiefly to determine the *ownership* of underwater lands. In general, lands under waters that are navigable *in law* are presumed to have been retained by

the state (or king) when the original grants of the water-side lands were made — unless, of course, a grant of such underwater lands was clearly intended. (For lands under waters that are *not* navigable in law, the opposite presumption is made, *viz.* that such underwater lands belong to the adjacent upland owners. *See infra* Chapter III.)

Since Chancellor Kent's seminal dictum in *Palmer v. Mulligan*, 3 Cai. R. 308, 318a-19 (N.Y. Sup. Ct. 1805) (Hudson at Stillwater [fresh and non-tidal]), New York cases have generally followed the English precedents and have defined navigability *in law* to mean *only* those waters that are subject to the ebb and flow of the tides. In accordance with this principle, most lands under tidal waters, including the tidal portion of the Hudson River, are owned by the state; most lands under the state's fresh waters are owned privately.

There is, incidentally, ample indication that Chancellor Kent may have applied the English common law incorrectly and that, in England, any water that was navigable *in fact* was also navigable *in law. See Waterford Elec. Light, Heat & Power Co. v. New York*, 208 A.D. 273, 275-76, 203 N.Y.S. 858, 861-62 (3d Dept. 1924), *aff'd*, 239 N.Y. 629, 147 N.E. 225 (1925) (Hudson at Van Schoenhoven rapids). Right or wrong, however, Chancellor Kent's version of things "is now firmly established in this State." *Id.* at 208 A.D. 281, 203 N.Y.S. 866.

In *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E. 199, 202 (1911) (Oswego River), the court wrote:

> *In law*, the term 'navigable river' has received a technical application to rivers, or arms of the sea, in which *the tide ebbs and flows*. The common law of England regarded all fresh water rivers as non-navigable . . . . The navigability, in fact, of a stream had no relevancy to the question of the title to the bed; it was relevant solely to the public right to pass, or to transport, upon as upon a highway (emphasis added).

In *Smith v. Rochester*, 92 N.Y. 463, 479 (1883) (Hemlock Lake), the court approvingly quoted an extensive footnote to *Ex parte Jennings*, 6 Cow. 518, 543 (N.Y. Sup. Ct. 1826) to

the effect that: "Rivers not navigable, that is fresh waters of what kind soever, do of common right belong to the owners of the soil adjacent to the extent of their land in length."

In *People v. Tibbetts*, 19 N.Y. 523, 526 (1859), it was said: "If the Hudson was . . . a navigable stream at Troy, . . . then it was the property of the people. A river is considered as an arm of the sea, and as such navigable, *so far as the tide rises and falls*. That is a *technical* rule of early establishment . . . ." (emphasis added). Incidentally, the fact that the water might be fresh would not prevent it from being navigable in law provided that the requisite tidal influence was present. *Id.*

In *Ex parte Jennings*, 6 Cow. 518, 528 (N.Y. Sup. Ct. 1826), the court wrote:

> By the term *navigable river*, the law does not mean such as is navigable in common parlance. The smallest creek may be so [navigable] to a certain extent, as well as the largest river, without being legally a navigable stream. The term has in law a technical meaning; and applies to all streams, rivers or arms of the sea, where the tide ebbs and flows (emphasis added).

See also State v. Bishop, 46 A.D.2d 654, 359 N.Y.S.2d 817, 820 (2d Dept. 1974). Referring to marshlands at the edge of Moriches Bay (tidal), the court observed that: "[W]aters, though not navigable in fact are deemed navigable in law when they are shallow reaches of navigable bodies. Over such waters the power of the State extends."

But cf.: A few twentieth century cases have held that "[n]avigability in fact is the test of navigability in law." *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 360, 16 N.Y.S.2d 812, 817 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940) (citations omitted) (small Hudson tributaries of Iona Bay, Doodletown Creek, and Popolopen Creek are navigable in fact), citing cases from the United States Supreme Court; *City of Albany v. State*, 71 Misc. 2d 294, 297, 335 N.Y.S.2d 975, 979 (N.Y. Ct. Cl. 1972) (dictum); *Findley Lake Property Owners, Inc. v. Town of Mina*, 31 Misc. 2d 356, 378, 154 N.Y.S.2d 775, 796 (N.Y. Sup.

Ct. 1956); *Board of Hudson River Regulating Dist. v. Fonda, J. & G.R. Co.*, 223 A.D. 358, 360, 228 N.Y.S. 686, 688 (3d Dept. 1928), *modified on other grounds*, 249 N.Y. 445 (1928); *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (Susquehanna River: "The test of navigability in law, is navigability in fact"). There is not, however, clear twentieth century authority for applying this rule (which is the federal rule and the majority American rule) in New York.

2.3 Navigability in Fact — Even if the bed of a stream or lake is in private ownership, the public still has a right of passage, as on a highway, if the stream or lake is navigable *in fact*. *See infra* § 4.3. This navigability *in fact* test is entirely distinct from the ebb-and-flow test of navigability *in law*. Navigability in fact means essentially what it says, and the determinations of navigability in fact are, of course, fact-bound determinations. A variety of definitional criteria are presented by the cases.

2.3.1. The Landmark New York Case — on navigability *in fact* is *Morgan v. King*, 35 N.Y. 454, 458-59 (1866), in which the New York Court of Appeals (Court of Appeals) wrote:

> By the common law of England, . . . a river is, in fact, navigable, on which boats, lighters or rafts may be floated to market . . . . [However,] the rule of the common law, as to what degree of capacity renders a river navigable, in fact, should be received, in this country, with such modifications as will adapt it to the peculiar character of our streams and the commerce for which they may be used . . . . [W]e have many streams, of considerable extent, not navigable by boats, lighters or rafts, but capable of floating to market single logs or sticks of timber . . . . *The true rule* is, that the public have a right of way in every stream *which is capable, in its natural state and its ordinary volume of water, of transporting*, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks (emphasis added).

The Court of Appeals added that, to support the public right

of way, it is *not* essential that:

- the property to be transported be carried in vessels (*i.e.*, a capacity to float logs is sufficient);

- the stream be navigable both *against* as well as with the current; or

- the navigation capacity be continuous, *viz.* in all seasons of the year. *Id.* at 499.

"If it is so far navigable *or floatable*, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be *liberally supported.*" *Id.* (emphasis added).

Despite the breadth of its definition of navigable in fact, the Court of Appeals in *Morgan v. King* declined to hold that the Racquette River between Colton and Raymondsville was a public highway. *Id.* at 460. In reaching that conclusion, the court pointed to three factors: (1) the stream, in its natural state, "was not capable of floating even single logs, except during seasons of high-water, which were about two months in a year," and, even then, the logs could not go down unassisted or, for that matter, undamaged; (2) the stream had become useful for transport only because the Legislature had provided funds for "artificial improvements"; and (3) the Legislature had provided that persons using the river for log transport should pay the pre-existing dam owners for "such damages as he or they might sustain" in altering the existing dams and booms, but plaintiff was instead trying to force the dam alterations without paying. *Id.* at 460-61.

It is perhaps also notable that, according to the court, the relevant section of the Racquette River "was not capable, *at any season*, of being navigated by vessels, barges, lighters or rafts." *Id.* at 456 (emphasis added).

2.3.2. Definitions Based on Commercial Use — The potential of a stream for use in commerce has been repeatedly cited in New York as a basis for finding the stream to be navigable in fact, beginning with the landmark case of *Morgan v. King*, 35 N.Y. 453, 458-59 (1866) ("capable . . . of transporting [products] in a condition fit for market").

In *Sawczyk v. United States Coast Guard*, 499 F. Supp. 1034, 1039 (W.D.N.Y. 1980), the Falls-to-Lewiston reach of

the Niagara River was found navigable in fact (and thus subject to United States admiralty jurisdiction) based in part on commercial use in the form of *regularly operated raft trips* (apparently recreational), stating that "the raft venture at issue in these cases evidences the continuing effort to exploit the river commercially." The court added, "[i]t is not necessary that a waterway now be open and used commercially, if it is susceptible of being used for transport and commerce whatever the modes may be." *Id.* at 1040.

"[The bank is] a channel for useful commerce of a substantial and permanent character . . . ." *People v. Waite*, 103 Misc. 2d 204, 207, 425 N.Y.S.2d 462, 464 (St. Law. County Ct. 1979).

"[A] waterway is navigable in fact only when it is used, or susceptible of being used, *in its natural and ordinary condition* (emphasis in original), as a highway for *commerce* . . . . (emphasis added)" *Thornhill v. Skidmore*, 32 Misc. 2d 320, 323, 227 N.Y.S.2d 793, 796 (N.Y. Sup. Ct. 1961).

In *Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 825-26 (2d Dept. 1960), after stating that the ebb-and-flow test does not apply, the court said that "a waterway is navigable in fact only when it is used, or susceptible of being used, in its natural and ordinary condition, as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

"The harbor is in fact navigable, not only by private boats but by the smaller types of commercial craft, such as fishing and oyster boats." *People v. Kraemer*, 7 Misc. 2d 373, 380, 164 N.Y.S.2d 423, 429 (Police Ct. Suff. County 1957), *aff'd*, 6 N.Y.2d 363, 160 N.E.2d 633, 189 N.Y.S.2d 878 (1959) (quoting with approval from *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940)).

"[T]he creek and bay had both been actually navigable *commercially* and for pleasure and . . . they still retain their capacity for such use . . . . Rivers are navigable in fact when they are susceptible of being used in their ordinary condition as highways of commerce." *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 360-61, 16 N.Y.S.2d 812, 817 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932

(1940) (emphasis added) (Iona Bay, Doodletown Creek, and Popolopen Creek are navigable in fact). The court also quoted from *Economy Light Co. v. United States*, 256 U.S. 113, 122-23 (1921), stating that "[t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."

"[The fact that the river is] used extensively for floating logs and transporting logs and timber, products of the forests along its banks . . . is quite sufficient to establish its navigability." *Finch, Pruyn & Co. v. State*, 122 Misc. 404, 408, 203 N.Y.S. 165, 169 (N.Y. Ct. Cl. 1924) (Hudson at and above Glens Falls).

"[C]apable in [their] natural state and in [their] ordinary volume of water of transporting in a condition fit to market the products of the forests and mines." *Ten Eyck v. Town of Warwick*, 75 Hun. 562, 566 (N.Y. Sup. Ct. 2d Dept. 1894) (inlet to Greenwood Lake not navigable).

"[U]sed for rafting for twenty-six years and upwards . . . . When a river is so far navigable as to be of public use in the transportation of property, the public claim to such navigation ought to be liberally supported." *Shaw v. Crawford*, 10 Johns. 236, 237 (N.Y. Sup. Ct. 1813).

2.3.3. Definitions Based on Recreational Use — Usefulness in commerce has not been the only criterion used to determine whether a stream is navigable in fact. A number of more recent cases cite actual use of the waterway for recreational purposes as a basis for finding it to be navigable in fact. Only one New York case has been found which suggests (apparently as dictum), that a finding of navigability in fact could not be based upon recreational use (*Lewis v. Clark*, 133 N.Y.S.2d 880 (N.Y. Sup. Ct. 1954) discussed *infra* § 2.3.3).

In *Trustees of Freeholders and Commonality of Southampton v. Heilner*, 84 Misc. 2d 318, 328, 375 N.Y.S.2d 761, 770 (N.Y. Sup. Ct. 1975), the court cited use by pleasure craft as the primary evidence of navigability in fact, stating: "[i]n today's life it cannot be said that this use is less important to society than commercial uses such as logging or transporting produce across the water."

"[I]t was traveled by pleasure boats and sport fishing boats . . . [this is a] navigable stream." *St. Lawrence Shores, Inc. v. State* , 60 Misc. 2d 74, 78, 302 N.Y.S.2d 606, 612 (N.Y. Ct. Cl. 1969).

"[T]he fact that a stream has been used for pleasure boating may be considered on the subject of the stream's capacity and the use of which it is susceptible." *Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 826 (2d Dept. 1960).

"The creek and bay had both been actually navigable commercially *and for pleasure* and . . . they still retain their capacity for such use." *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 360, 16 N.Y.S.2d 812, 817 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940) (emphasis added) (Iona Bay, Doodletown Creek, and Popolopen Creek are navigable in fact).

"Nor is lack of commercial traffic a bar to the conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *People v. Kraemer*, 7 Misc. 2d 373, 380, 164 N.Y.S.2d 423, 429 (Police Ct. Suff. County 1957) (quoting with approval from *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940)).

"Fleets of boats and canoes came down from which occupants would camp out overnight, or become guests of hotels along the river." The river was held to be navigable. *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 777, 191 N.Y.S. 464, 467 (N.Y. Sup. Ct. 1921) (Susquehanna River).

See Sawczyk v. United States Coast Guard, 499 F. Supp. 1034, 1039 (W.D.N.Y. 1980), which found navigability in fact based upon a regularly operated raft venture (apparently recreational) on the grounds that it "evidences the continuing effort to exploit the river commercially."

Contra:

Lewis v. Clark, 133 N.Y.S.2d 880, 898 (N.Y. Sup. Ct. 1954) "Mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is suffi-

cient for pleasure boating or to enable hunters and fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation." (quoting *Harrison v. Fite*, 148 F. 781, 783-84 (8th Cir. 1906)).

2.3.4. Effect of Rapids or Other Obstacles to Navigation — Many cases recognize that places which cannot be navigated are frequently found in otherwise navigable streams or stretches of streams. However, it is invariably held that: "The general character of a stream as to being navigable is not changed by the fact that at a particular place it is not navigable in fact by boats." *People v. New York & Ontario Power Co.*, 219 A.D. 114, 115, 219 N.Y.S. 497, 500 (3d Dept. 1927) (Niagara River at the falls).

In *Sawczyk v. United States Coast Guard*, 499 F. Supp. 1034, 1039 (W.D.N.Y. 1980), the Falls-to-Lewiston reach of the Niagara River was found navigable in fact (and thus subject to United States admiralty jurisdiction) despite the fact that portions of the river may be non-navigable. The fact "that a river is difficult to navigate . . . or even that it is 'interrupted by occasional natural obstructions' does not preclude a finding of navigability in a legal sense." *Id.* at 1039-40.

"[T]he waters being navigable in part, must be deemed navigable in whole." *Hawkins v. State*, 54 Misc. 2d 847, 852, 283 N.Y.S.2d 615, 621 (N.Y. Ct. Cl. 1967) (referring to the navigability in fact of East Bay, a portion of Lake Ontario, and holding it to be owned by the state, absent an express grant).

"The interruption of navigability by the water falls in the middle part of the river did not have any effect upon the legal character of the stream." *People v. System Properties*, 281 A.D. 433, 444, 120 N.Y.S.2d 269, 279 (3d Dept. 1953), *modified on other grounds*, 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S.2d 859, (1957) (Ticonderoga River is navigable).

"Navigability is not destroyed because of occasional natural obstructions or portages, nor it is necessary that navigation continue at all seasons of the year . . . ." *People ex rel. Erie R.R. v. State Tax Comm'n*, 266 A.D. 452, 454, 43 N.Y.S.2d 189, 191 (3d Dept. 1943), *aff'd*, 293 N.Y. 900, 60 N.E.2d 31

(1944).

> The general character of a stream as to being navigable is not changed by the fact that at a particular place it is not in fact navigable by boats . . . . A public right on a stream is a right of travel as on a public highway. It is not necessary that in order to be navigable the stream should admit the passage of boats at all times and at all portions of the stream.

People ex rel. New York Cent. R.R. Co. v. State Tax Comm'n, 258 A.D. 356, 361, 16 N.Y.S.2d 812, 817 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940) (Iona Bay, Doodletown Creek and Popolopen Creek are navigable in fact).

"[T]he Niagara River, being navigable in part, is thus navigable in whole, so far as the control of the river for purposes of commerce and navigation is concerned." *Niagara Falls Power Co. v. Water Power and Control Comm'n*, 267 N.Y. 265, 270, 196 N.E. 51, 53 (1935).

"Rifts and shallows do not affect its general character as a navigable stream . . . ." *New York Power & Light Corp. v. New York*, 230 A.D. 338, 342, 245 N.Y.S. 44, 49 (3d Dept. 1930).

The Seneca River is navigable in fact "notwithstanding interruption of its navigability at places by rapids or obstructions." *James Frazee Milling Co. v. State*, 122 Misc. 545, 547, 204 N.Y.S. 645, 648 (N.Y. Ct. Cl. 1924).

"The criterion is the adaptability of the river in its entirety for the purposes of transportation in and about the locality of the place in question." *West Virginia Pulp & Paper Co. of Delaware v. Peck*, 189 A.D. 286, 292, 178 N.Y.S. 663, 667 (3d Dept. 1919).

"In order to be navigable, it is not necessary that it [a stream] should be deep enough to admit passage of boats at all portions of the stream." *Danes v. New York*, 219 N.Y. 67, 71, 113 N.E. 786, 787 (1916).

Cf. State v. Bishop, 46 A.D.2d 654, 359 N.Y.S.2d 817, 820 (2d Dept. 1974): "[W]aters, though not navigable in fact are deemed navigable in law when they are shallow reaches of

navigable waters. Over such waters the power of the State extends."

See also:

Niagara Falls Power Co. v. Duryea, 185 Misc. 696, 704, 57 N.Y.S.2d 777, 784 (N.Y. Sup. Ct. 1945) (the Niagara River is "a navigable stream even at the point of the falls.").

People ex rel. New York O. & W. Ry. v. State Tax Comm'n, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (Susquehanna River "It is not necessary that, in order to be navigable, the river should be deep enough to admit the passage of boats at all portions of the stream.").

Finch Pruyn & Co. v. State, 122 Misc. 404, 408, 203 N.Y.S. 165, 169 (N.Y. Ct. Cl. 1924) (Hudson at and above Glens Falls).

Powell v. City of Rochester, 93 Misc. 227, 232-33, 157 N.Y.S. 109, 113 (N.Y. Sup. Ct. 1916) (Genesee River: "[T]he fact that certain parts of it were never navigable does not alter its character as a navigable stream and a public highway.").

In re Comm'rs of State Reservation at Niagara, 37 Hun. 537, 547-48 (N.Y. Sup. Ct. 5th Dept. 1885) ("[T]he fact that at the particular place in the river is not navigable by reason of the interruption produced by the falls does not qualify or distinguish it in that locality as a public river from it general character.").

2.3.5. Effect of Variations in a Stream's Capacity for Navigation — Natural water levels fluctuate and a waterway's capacity for navigation fluctuates with them. In *Morgan v. King*, 35 N.Y. 454, 458-59 (1866), one of the few cases to consider this point, the Court of Appeals seemed to stress seasonal *regularity* of navigable capacity rather than *constancy* of capacity:

> If [a stream] is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity, ordinarily, continue a sufficient length of time to make it useful as a highway, it is subject to the public

easement.

Id. at 459.

Two earlier cases, both cited in *Morgan v. King*, indicate that a stream cannot be considered navigable if it practically has to be raining for any navigation capability to exist. *Curtis v. Keesler*, 14 Barb. 511, 518 (N.Y. Sup. Ct. 1852) (Callicoon Creek is non-navigable, usable only "an aggregate of some four weeks in the year, when swollen . . . ."); and *Munson v. Hungerford*, 6 Barb. 265, 270 (N.Y. Sup. Ct. 1849) (Black River non-navigable between Carthage and Dexter): "It is not enough that a stream is capable, (during a period in aggregate of from two to four weeks in the year when it is swollen by the spring and autumn freshets), of carrying down its rapid course whatever may have been thrown upon its angry waters . . . ."

It is unlikely, however, that these durational requirements for navigability in fact would affect very many streams that are worthwhile for either commercial or recreational boating. Although whitewater enthusiasts may find certain streams interesting only during the times of spring rains and snow-melt, a stream's capacity for navigation does not depend on its being interesting as whitewater, but rather on its being reasonably passable.

See also:

People ex rel. Erie R.R. v. State Tax Comm'n, 266 A.D. 452, 454, 43 N.Y.S.2d 189, 191 (3d Dept. 1943), *aff'd*, 293 N.Y. 900, 60 N.E.2d 31 (1944) ("[N]or is it necessary that the navigation continue at all seasons of the year . . . .").

James Frazee Milling Co. v. State, 122 Misc. 545, 547, 204 N.Y.S. 645, 648 (N.Y. Ct. Cl. 1924) (Seneca River navigable in fact) ("[N]or need the navigation be open at all seasons of the year or at all stages of water.").

Ten Eyck v. Town of Warwick, 75 Hun. 562, 566 (N.Y. Sup. Ct. 1894) (inlet to Greenwood Lake not navigable) ("Neither is it essential that the floatable capacity must be continuous. If it be ordinarily and subject to fluctuations in volume attributable to natural causes, and occurring with regularity and continuing sufficiently long to make it useful as a highway, it is subject to public use.").

2.3.6. Other Definitional Statements of Navigability in Fact — confirm the view that, if a stream is naturally usable for travel in boats, it is navigable in fact and, therefore, legally available for such use.

"[T]he paramount factor . . . is not the actual use to which a stream has been put, or the purpose of its use that is important, but rather its capacity for use and its susceptibility for use (in its original state or condition) for trade, commerce, *or travel.*" *Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 826 (2d Dept. 1960) (emphasis added) (action by the bed-owner for trespass).

"[T]he river has been used by row boats, and canoes . . . for traffic, fishing and trapping." *People ex rel. Erie R.R. v. State Tax Comm'n*, 266 A.D. 452, 454, 43 N.Y.S.2d 189, 191 (3d Dept. 1943), *aff'd*, 293 N.Y. 900, 60 N.E.2d 31 (1944).

A stream "does not lose this characteristic [of navigability] even if it has fallen into disuse for a hundred years. 'A hundred years is a brief space in the life of a nation'. . . ." *Id.* at 454, 43 N.Y.S.2d at 191-92.

"[A] sufficient amount of water . . . to allow the navigation of small boats and that . . . salt hay, hoop poles and hundreds of cords of wood were carried out of the creek by means of boats and rafts, and that small boats have navigated the creek . . . ." *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 360, 16 N.Y.S.2d 812, 816 (3d Dept. 1940), *aff'd*, 284 N.Y. 616 (1940) (Iona Bay, Doodletown Creek, and Popolopen Creek are navigable in fact).

"*Fishermen* still continue to navigate the stream in small boats . . . . Streams so shallow as to accommodate small size craft only are now determined to be navigable in fact." *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 238 A.D. 267, 268, 264 N.Y.S. 285, 286 (3d Dept. 1933) (emphasis added) (Roeliff Jansen's Kill — also tidal).

"Motor boats, rowboats, rafts and skiffs navigate the two streams [Cascadilla Creek and Six Mile Creek]." *People ex rel. Lehigh Valley R.R. v. State Tax Comm'n*, 247 N.Y. 9, 11, 159 N.E. 703, 705 (1928).

"Nor does the fact that the river was not used for transportation of logs and timber until after the issue of the grant

affect the question of navigability at the time of such issue. The river at that time was *susceptible* of the use to which it was afterward subjected . . . ." *Finch, Pruyn & Co. v. State*, 122 Misc. 404, 408, 203 N.Y.S. 165, 169 (N.Y. Ct. Cl. 1924) (emphasis added) (Hudson at and above Glens Falls).

"The capacity to float logs, singly or together, to run rafts however small, gives to all the public this easement . . . ." *People ex rel. New York O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 776, 191 N.Y.S. 464, 467 (N.Y. Sup. Ct. 1921) (Susquehanna River).

"It is urged [that] . . . the Seneca River being a navigable stream, it did not lose its navigable character because of any obstructions which were permitted to exist therein or over the same . . . . We think the position thus taken . . . is correct." *Lehigh Valley R.R. v. Canal Board*, 146 A.D. 151, 158-59, 130 N.Y.S. 978, 982-83 (4th Dept. 1911), *aff'd*, 204 N.Y. 471 (1912).

"Whether salt, or fresh, water streams, if they were large enough to be capable of common passage and thus, in fact, were navigable, they were regarded as common highways, which might not be impeded." *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E. 199, 202 (1911).

> Because some products may be floated to market as rafts and upon rafts, it is not essential to the public character of the stream that property can be carried in vessels . . . . As some streams are unnavigable against their current, if they are floatable in their natural state, so as to be of public use with the current, their public character is liberally supported.

Ten Eyck v. Town of Warwick, 75 Hun. 562, 566 (N.Y. Sup. Ct. 1894) (inlet to Greenwood Lake not navigable).

"[N]avigable by small vessels." *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, 4 N.Y. St. Rep. 380, 383 (Sup. Ct. 5th Dept. 1887) *aff'd*, 115 N.Y. 667, 22 N.E. 1126 (1889) (Keuka Lake navigable).

"[R]ivers of sufficient magnitude and capacity for navigation are public highways, and . . . [the rights of private owners

are] . . . subject to the easement of the public, which they cannot lawfully interrupt." *In re Comm'rs of St. Reservation at Niagara*, 37 Hun. 537, 545 (N.Y. Sup. Ct. 5th Dept. 1885).

"It is not necessary that the stream should be navigable through its whole length. The public may use such portions of it as are navigable . . . ." *Curtis v. Keesler*, 14 Barb. 511, 518 (N.Y. Sup. Ct. 1852) (holding Callicoon Creek unnavigable, relying on the "uncontrovertible principles of the common law" on stream ownership as pronounced by Lord Hale).

"[N]avigable for vessels, boats, lighters, and as it has also been held, for rafts." *Munson v. Hungerford*, 6 Barb. 265, 269 (N.Y. Sup. Ct. 1849) (holding the Black River non-navigable between Carthage and Dexter).

"[W]hether they are susceptible or not of use as common passage for the public." *People v. Platt*, 17 Johns. 195, 211 (N.Y. Sup. Ct. 1819).

2.4. Statutory/Regulatory Definitions of "Navigation" or "Navigable" — For various purposes, the Legislature or administrative agencies acting under statutory mandate have classified waters in terms of "navigability" in order to define the applicability of particular legislative programs. In general, the concepts of navigability for such purposes are fairly close to the common-law concept of navigable *in fact*. It is important to note, however, that the various statutory/regulatory definitions of navigability are not necessarily identical to the common law concept. The cases elaborating on the former may, therefore, not necessarily have any relevance to the public right of passage.

2.4.1. The New York Navigation Law — defines "navigable waters of the state" to mean: "all lakes, rivers, streams and waters within the boundaries of the state *and not privately owned*, which are navigable in fact or upon which vessels are operated, except the tidewaters of Nassau and Suffolk Counties." N.Y. Nav. Law § 2[4] (McKinney 1941 & Supp. 1989) (emphasis added). The same statute defines "navigable in fact" as:

> navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and

> permanent character conducted in the customary mode of trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious or unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation.

N.Y. Nav. Law § 2[5] (McKinney 1941 & Supp. 1989).

The Navigation Law does not have any provisions of direct bearing on the public's right of passage. These definitions establishing the scope of the Navigation Law do not purport to affect the common-law definitions of navigability for purposes of the public's right of passage.

2.4.2. The Department of Environmental Conservation Regulations — define "navigable waters of the state" to mean:

> all lakes, rivers, streams and other bodies of water in the State which are navigable in fact or upon which vessels with a capacity of one or more persons can be operated. It shall not include waters which are surrounded by land held in single private ownership at every point in their total area.

6 N.Y. Comp. Codes R. & Regs. tit. 6, § 608.1(h) (1984).

2.4.3. Federal Definitions — Because they define the reach of federal authority to regulate the nation's navigable waterways, these definitions of navigability tend to be broadly framed, *e.g.*:

> [T]he Genesee River is 'navigable waters' from Rochester to Mount Morris, if (1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements.

Rochester Gas & Elec. Corp. v. Federal Power Comm'n, 344 F.2d 594, 596 (2d Cir. 1965) (Genesee navigable at Rochester, but not shown to be navigable at Mount Morris, for purposes of Federal Power Act and Rivers and Harbors Act).

The most important distinction between New York's common law definition and the federal definition is that, at least since 1940, the latter also considers *artificial* improvements that enhance, presently or prospectively, a stream's usefulness for transportation. *See* the federal landmark case, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-10 (1940). It remains to be seen whether the New York courts will similarly expand upon their own traditional common law definition (which traditionally considers only the *natural* condition of the stream). For a positive sign, *see People v. System Properties*, 281 A.D. 433, 443, 120 N.Y.S.2d 269, 278-279 (3d Dept. 1953) (Ticonderoga River is navigable), *modified on other grounds*, 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S.2d 859 (1957).

While the federal definition of "natural" navigability is itself very broad, the Court of Appeals has observed that "the New York definition may be even broader." *Van Cortlandt v. New York Cent. R.R.*, 265 N.Y. 249, 255, 192 N.E. 401, 402 (1934) (Croton River).

2.4.4. Other Statutory Definitions — occasionally appear in the cases. Again, it should be remembered that these statutory interpretations do not necessarily have any bearing whatsoever on the common law concept of "navigability in fact" for purposes of the public right of passage. For example:

Brant Lake Shores, Inc. v. Barton, 61 Misc. 2d 902, 907, 307 N.Y.S.2d 1005, 1012 (N.Y. Sup. Ct. 1970) (construing a legislative declaration that a certain stream and lake were "public highways for the purpose of floating logs, timber and lumber down those streams"; the court held that the legislature did not thereby mandate use for swimming or boating).

Van Cortlandt v. New York Cent. R.R., 265 N.Y. 249, 254, 254 N.E. 401, 402 (1934) (railroad charter requiring movable bridges over "navigable" streams; the court held it inapplicable to Croton River).

2.5. Specific Streams and Waterbodies — under the common law definitions:

2.5.1. Held or Said to be Navigable in Fact:

Ausable River — *Brewster v. J. & J. Rogers Co.*, 169 N.Y.

73, 78, 62 N.E. 164, 165 (1901).

Battenkill — *Shaw v. Crawford*, 10 Johns. 236, 237 (N.Y. Sup. Ct. 1813).

Canandaigua Lake — *Granger v. City of Canandaigua*, 257 N.Y. 126, 132, 177 N.E. 394, 396 (1931).

Canisteo River — *Browne & Jamison v. Scofield*, 8 Barb. 239, 243 (N.Y. Sup. Ct. 1850).

Cascadilla Creek — *People ex rel. Lehigh Valley Ry. v. State Tax Comm'n*, 247 N.Y. 9, 12, 159 N.E. 703, 705 (1928) (motor boats, rowboats, rafts, skiffs).

Cayuga Lake — *Stewart v. Turney*, 237 N.Y. 117, 120, 142 N.E. 437, 438 (1923) (also mentions Canaderaga, Cazenovia, Cranberry, Cross, George, Oneida, Onondaga, Otisco, Otsego, Owasco, Saranac, Saratoga, Schroon, Skaneateles and Tupper Lakes as navigable in fact); *New York State Water Resources Comm'n v. Liberman*, 37 A.D.2d 484, 488, 326 N.Y.S.2d 284, 288 (3d Dept. 1971).

Chemung River — *Bacorn v. State*, 20 Misc. 2d 369, 372, 195 N.Y.S.2d 214, 217 (N.Y. Ct. Cl. 1959); *People ex rel. Erie R.R. v. State Tax Comm'n*, 266 A.D. 452, 455, 43 N.Y.S.2d 189, 192 (3d Dept. 1943), *aff'd*, 293 N.Y. 900, 60 N.E.2d 31 (1944).

Chenango River — *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 185 (1886).

Crooked Creek — *St. Lawrence Shores v. State*, 60 Misc. 2d 74, 79, 302 N.Y.S.2d 606, 612 (N.Y. Ct. Cl. 1969).

Doodletown Bight — *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 361, 16 N.Y.S.2d 812, 818 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940).

Genesee River — *People ex rel. Western New York & P. Ry. v. State Tax Comm'n*, 244 N.Y. 596, 597, 155 N.E. 911, 912 (1927).

Hemlock Lake — *Smith v. Rochester*, 92 N.Y. 463, 474 (1883).

Hudson River — *Finch, Pruyn & Co. v. State*, 122 Misc. 404, 408, 203 N.Y.S. 165, 169 (N.Y. Ct. Cl. 1924) (at and above Glens Falls).

Iona Creek Bay — *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 361, 16 N.Y.S.2d 812, 818

(3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940).

Island Creek — *People v. Delaware & Hudson Co.*, 213 N.Y. 194, 198, 107 N.E. 506 (1914).

Keuka Lake — *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, 4 N.Y. St. Rep. 380, 383 (N.Y. Sup. Ct. 5th Dept. 1887) *aff'd*, 115 N.Y. 667, 22 N.E. 1126 (1889).

Mohawk River — *Danes v. New York*, 219 N.Y. 67, 70, 113 N.E. 786, 787 (1916).

Niagara River — *Sawczyk v. United States Coast Guard*, 499 F. Supp. 1034, 1039 (W.D.N.Y. 1980) (Falls to Lewiston; even though "forbidding and dangerous"); *See also Niagara Falls Power Co. v. Water Power and Control Comm'n*, 267 N.Y. 265, 270, 196 N.E. 51, 53 (1935); *Commissioners of the State Reserv. at Niagara*, 37 Hun. 537, 547 (N.Y. Sup. Ct. 5th Dept. 1885).

Peekskill Bay — *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 239 N.Y. 183 (1924).

Popolopen Creek — *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 361, 16 N.Y.S.2d 812, 818 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940).

Oswego River — *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E.2d 199, 202 (1911) (certain stretches other than at Fulton).

Roeliff Jansen's Kill — *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 238 A.D. 267, 268, 264 N.Y.S. 285, 286 (3d Dept. 1933) (also tidal).

Salmon River (near Lake Ontario) — *Hooker v. Cummings*, 20 Johns. 90, 100-01 (N.Y. Sup. Ct. 1822).

Seneca River — *James Frazee Milling Co. v. State*, 122 Misc. 545, 547, 204 N.Y.S. 645, 648 (N.Y. Ct. Cl. 1924); *Lehigh Valley R.R. v. Canal Board*, 69 Misc. 251, 255, 125 N.Y.S. 227, 230, *aff'd*, 146 A.D. 151, 158, 130 N.Y.S. 978, 982 (4th Dept. 1911), *aff'd*, 204 N.Y. 471, 97 N.E. 964 (1912).

Six Mile Creek — *People ex rel. Lehigh Valley Ry. v. State Tax Comm'n*, 247 N.Y. 9, 159 N.E. 703, 705 (1928).

Susquehanna River — *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (from Otsego Lake throughout its course).

Ticonderoga River — *People v. System Properties*, 281 A.D. 433, 443, 120 N.Y.S.2d 269, 279 (3d Dept. 1953), *modified on other grounds*, 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S.2d 859 (1957).

2.5.2. Held or Said to be Non-navigable in Fact:

Black River — *Munson v. Hungerford*, 6 Barb. 265, 270 (N.Y. Sup. Ct. 1849) (Carthage to Dexter).

Callicoon Creek — *Curtis v. Keesler*, 14 Barb. 511, 518 (N.Y. Sup. Ct. Spec T. 1852).

Crumhorn Lake — *Mix v. Tice*, 164 Misc. 261, 266, 298 N.Y.S. 441, 447 (N.Y. Sup. Ct. 1937).

Greenwood Lake — *Ten Eyck v. Town of Warwick*, 75 Hun. 562, 567 (N.Y. Sup. Ct. 2d Dept. 1894) (not a highway from one town to another).

Honeoye Creek — *Smith v. Rochester*, 92 N.Y. 463, 475 (1883).

Oswego River — *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E.2d 199, 202 (1911) (at Fulton).

Peekskill Creek — *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 239 N.Y. 183, 186, 146 N.E. 197, 198 (1924).

Racquette River — *Morgan v. King*, 35 N.Y. 454, 458 (1866) (Colton to Raymondsville).

Saranac River — *People v. Platt*, 17 Johns. 195, 216 (N.Y. Sup. Ct. 1819).

Chapter III.

OWNERSHIP OF STREAMBEDS

3. Ownership of Streambeds — The ownership question has been the primary litigated issue in the New York cases that deal with the public's rights in navigable waters. It is clear, by the way, that state law rather than federal law controls this issue:

> The long-settled rule is that the states, and not the federal government, hold title to the subaqueous land within their boundaries and have the concomitant power to determine the nature and extent of the interests adjacent land owners and others may acquire, subject only to the dominant federal right of navigation.

United States v. Kane, 602 F.2d 490, 494 (2d Cir. 1979). *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60 (1913) (state law controls on issue of ownership).

In New York, title to streambed lands depends fundamentally, like all land titles, on the history and proper interpretation of the chain of conveyances beginning with the root of title. The roots of land titles in New York are usually the original grants from either the state or from the colonial representatives of the British monarch. The critical question with respect to underwater lands is generally whether the original grantor intended to include such lands in the grant when the adjacent uplands were conveyed into private ownership. This question is, in principle, one of interpreting the conveyance but, as a practical matter, the grantor's intention is usually established by a legal *presumption.*

Under the traditional English common-law rule, now followed in New York, the legal presumption favors the riparian owners: absent an express intent to the contrary, grants of land on non-tidal streams are presumed intended to run to the center of the stream, irrespective of the stream's capacity for navigation in fact. This is in contrast to the dominant American rule, under which all lands beneath *actually* navigable non-tidal waters are presumed to be still retained as prop-

erty of the state. 1 WATERS AND WATER RIGHTS 256-57 (Clark ed. 1967).

The earliest New York cases wavered between these two rules of interpretation. Despite Chancellor Kent's strong but possibly misconceived seminal endorsement of the English rule in 1805 (*See supra* § 2.2), the dominant American rule almost became the law of New York. Indeed, in 1865 the Court of Appeals declared "as the settled law of the State" that the beds of "generally navigable" freshwater streams belong to the state. *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 479-81, 500 (1865). *See infra* section 3.2.1.2. However, the effect of this ruling was later limited to the Hudson and Mohawk Rivers. *Smith v. Rochester*, 92 N.Y. 463, 481-82 (1883). With the exception of those two rivers, the boundary rivers and large lakes, the beds of New York's fresh waters are now generally deemed to be in private ownership, having been conveyed to private owners as part of the grants of the riparian lands. *See Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 416, 94 N.E. 199, 203 (1911) ("[A] rule, which, by [its] long standing, has acquired the stability of a rule of property"; bed of Oswego is private); *Waterford Elec. Light, Heat & Power Co. v. New York*, 208 A.D. 273, 281, 203 N.Y.S. 858, 866-67 (3d Dept. 1924), *aff'd*, 239 N.Y. 629, 147 N.E. 225 (1925) (English rule is "now firmly established" except as to Hudson and Mohawk).

Even while most lands under New York's rivers and lakes are in private ownership, it must be emphasized that the familiar concept of ownership applies in only a very qualified way to land beneath waters that are navigable in fact. As Chancellor Kent himself wrote in support of his historic dictum, private title to the beds of fresh, non-tidal rivers can be "granted without any public inconvenience, because the right of the public, to the use of the water for navigation would remain incontestible." *Palmer v. Mulligan*, 3 Cai. R. 307, 319-20 (N.Y. Sup. Ct. 1805) (Hudson at Stillwater). Moreover, as the Court of Appeals later noted in finally embracing the English rule:

> When it is considered that the rights and interests of the

> public, such as *fishing, ferrying and transportation*, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign, it would seem to follow that the controversies which have arisen over nominal ownership of the soil under such waters have magnified beyond the real interests involved.

Smith v. City of Rochester, 92 N.Y. 463, 480 (1883) (emphasis added). Much of the confusion about the public's right of passage over streams has arisen, no doubt, because these major qualifications on private streambed ownership are often overlooked.

3.1. The English Law on Streambed Titles — is relevant in two respects:

(1) the common law in New York has been heavily influenced by the English doctrines on public/private rights in streams. *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412-13, 94 N.E. 199, 202 (1911). New York is, indeed, one of the few states which has adopted the English rules rather than the now-dominant American rules for determining streambed titles.

(2) many titles to specific riparian lands originated as conveyances from the British monarch in colonial times; the interpretation of these conveyances — though, in principle, a matter of New York colonial law — is primarily (but not entirely) controlled by the doctrines applicable in England at the time the conveyances were made. *See Danes v. New York*, 219 N.Y. 67, 72-75, 113 N.E. 786, 787-88 (1916).

As a general matter, the English law regarded freshwater rivers to be in private ownership:

> Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent so that the owners of the one side have of common right the propriety of the soil, and consequently the right of fishing, *usque filum aquae*;[2] and the owners of the other side the right of soil or ownership and fishing unto the *filum aqua* on their

2. I.e., to the "thread" or middle of the stream.

> side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience.

Hargrave's Hale, *De Jure Maris*, ch. I (quoted at length in *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 469 (1865)).

3.1.1. The "*Jus Privatum*" and the "*Jus Publicum*" — Following the lead of the English common law, the New York cases recognize that the sovereign ownership of underwater land is divided into two distinct components, the so-called "*jus privatum*" or private right and the "*jus publicum*" or public right. The court in *People v. Steeplechase Park Co.*, 218 N.Y. 459, 472-73, 113 N.E. 521, 524 (1916), explained as follows:

> A distinction was taken between mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum*, and was vested in the crown. But the right to use and control both the land and the water was deemed a *jus publicum*, and was vested in Parliament. [Quoting *Langdon v. Mayor*, 93 N.Y. 129, 154-55 (1883).] In this country, the state has succeeded to all rights of both crown and Parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the state.

People v. Steeplechase Park, 218 N.Y. 459, 473, 113 N.E. 521, 524 (1916). The term *jus publicum* is sometimes used loosely to refer to "the rights of the general public . . . to use navigable waters . . . for fishing, boating and other lawful purposes." *Durham v. Ingrassia*, 105 Misc. 2d 191, 431 N.Y.S.2d 917, 922 (N.Y. Sup. Ct. 1980). *See also Tucci v. Salzhauer*, 40 A.D.2d 712, 336 N.Y.S.2d 721, 723 (2d Dept. 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 854 (1973); and *People of Smithtown v. Poveromo*, 71 Misc. 2d 524, 531, 336 N.Y.S.2d 764, 773-74 (Sup. Ct. 1972), *rev'd on other grounds*, 79 A.D.2d

42, 359 N.Y.S.2d 848 (1973) (Nissequogue River) ("rights of navigation, travel along the foreshore, fishing and bathing"). In *Povermo*, the court also said, in a somewhat different vein, that "the jus publicum is nothing more than the great police power of the state." *Povermo*, 71 Misc. 2d 524, 534, 336 N.Y.S.2d 764, 776. *See also Arnold's Inn, Inc. v. Morgan*, 63 Misc. 2d 279, 283, 310 N.Y.S.2d 541, 547 (N.Y. Sup. Ct. 1970), *modified*, 35 A.D.2d 989, 317 N.Y.S.2d 989 (2d Dept. 1970).

In the discussion of this section on ownership of streambeds, the "ownership" being discussed is the basic fee simple ownership, or *jus privatum.*

3.1.2. The Public Trust Doctrine — At an earlier time, the English monarchs apparently found irresistible the temptation to pick up extra cash by selling off bits and pieces of the navigable tidewaters surrounding the British Isles. In order to mitigate the effects of these transactions on the public at large, the so-called "Public Trust" Doctrine emerged.

As a New York court has explained: "The title to lands under tide waters, within the realm of England, were, by the common law, deemed to be vested in the king as a *public trust*, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse." *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 76 (1877) (emphasis added). In other words, "the king, as *parens patriae*, owned the [submerged] soil . . . not for his own benefit, but for the benefit of his subjects at large . . . and he can not *now* deprive his subjects of these rights by granting the public navigable waters to individuals." *Lansing v. Smith*, 4 Wend. 9, 20-21 (N.Y. 1829) (emphasis added).

The main point of the English Public Trust Doctrine was to prevent the king from destroying the public's right of passage and fishing. If he conveyed trust lands into private ownership, the grantee took subject to the *jus publicum unless the king had Parliament's consent to convey a free and clear title. Id.* The doctrine was, in short, a check on royal whims.

In New York, the notion frequently appears in the cases that the state holds certain of its lands, especially the underwater lands, subject to a public trust. Indeed, the public trust has even been expanded to embrace not merely tidal waters,

as in England, but also rivers, *e.g.*, *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 418, 94 N.E. 199, 204 (1911), and lakes, *e.g.*, *Granger v. City of Canandaigua*, 257 N.Y. 126, 132, 177 N.E. 394, 396 (1931). However, the public trust is no check on sovereignty. The law is clear that the Legislature, as successor to both the king *and* Parliament, has the power to convey underwater lands into private hands free of the public trust and free of the public right of passage. *See infra* § 4.6. There are some qualifications (*See infra* § 4.6.4), but they exist because of public policy, not because of a public trust.

Some representative judicial discussion of the public trust concept in New York follows:

> The corpus of the trust encompasses public lands and navigable waters, the people represent the *cestui que* trust, and the sovereign is the trustee. It is the unqualified duty of the trustee to preserve the trust corpus for the benefit of the people (*jus publicum*). The *jus publicum* is nothing more than the great police power of the people.

People of Smithtown v. Poveromo, 71 Misc. 2d 524, 534, 336 N.Y.S.2d 764, 776 (N.Y. Sup. Ct. 1972), *rev'd on other grounds*, 79 Misc. 2d 42, 359 N.Y.S.2d 848 (1973) (Nissequogue River).

"[W]hile conveyance of lands under water for a public purpose is permissible because it accords with the public trust, purpose is not the determinative factor." *Riviera Ass'n, Inc. v. North Hempstead*, 52 Misc. 2d 575, 582, 276 N.Y.S.2d 249, 256-57 (N.Y. Sup. Ct. 1967) (containing an extensive review of the cases).

In *People v. System Properties Inc.*, 2 N.Y.2d 330, 344-45, 141 N.E.2d 429, 435, 160 N.Y.S.2d 859, 868 (1957), speaking of the sovereign power over Lake George, the Court of Appeals wrote: "The reach of that power in trust for the People is as great as the use and possibilities of the lake for navigation, as a water power reservoir *and not excluding recreational uses*." (emphasis added).

"[T]itle to the bed of Canandaigua Lake is in the State of New York in trust for all the people thereof." *Granger v. City of Canandaigua*, 257 N.Y. 126, 132, 177 N.E. 394, 396 (1931) (a dispute over lake bed title).

"The proprietary interest of the riparian owner is subordinate to the public easement of passage and the state may be regarded as the *trustee of a special public servitude.*" *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 418, 94 N.E. 199, 204 (1911) (emphasis added).

> The right to grant the navigable waters is as absolute and uncontrollable . . . as its right to grant the dry land which it owns. It holds all the public domain as absolute owner, and *is in no sense a trustee thereof*, except as it is organized and possesses all its property, functions and powers for the benefit of the people.

Langdon v. Mayor, 93 N.Y. 129, 156 (1883) (emphasis added).

> While the state holds title to lands under navigable water in a certain sense as a trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for public, or such other purposes as it may determine to be for the best interests of the state.

Saunders v. New York C. & H. R.R., 144 N.Y. 75, 86, 38 N.E. 992, 994 (1894).

"The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as representative of the people, grant the soil, or confer an exclusive privilege in tidewaters or authorize a use inconsistent with the public right." *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 78 (1877) (emphasis added).

"The public rights of navigation are . . . easements or servitudes which the State is bound and empowered to preserve and protect as a trustee for its citizens." *Commissioners of the Canal Fund v. Kempshall*, 26 Wend. 404, 420 (N.Y. Sup. Ct. 1841).

Other significant cases noting the public trust doctrine

are:

Miller v. City of New York, 15 N.Y.2d 34, 203 N.E.2d 478, 255 N.Y.S.2d 78 (1964) (park property impressed with a trust for the public cannot be alienated without express legislative sanction); *Brooklyn Park Comm'n v. Armstrong*, 45 N.Y. 234 (1871); *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 10, 105 N.E. 849, 852 (1914), quoting the United States Supreme Court landmark on the public trust, *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892); *Coxe v. State*, 144 N.Y. 396, 406, 39 N.E. 400, 402 (1895).

3.2. The General Rule of Streambed Ownership in New York — is that "the bed of [a non-tidal stream] is subject to private ownership, regardless of navigability." *People v. System Properties, Inc.*, 2 N.Y.2d 330, 340, 141 N.E.2d 429, 432, 160 N.Y.S.2d 859, 864 (1957). The court in *System Properties* made its determination of whether the claimant indeed had private ownership of the bed of the Ticonderoga River by examining the two possible roots of such a title, *viz.*:

(a) title received under a *grant* of the river bed, or

(b) title by *adverse possession* or *prescription.*

The court held that the claimant's grant *excluded* the bed of the river, but the claimant had acquired title by adverse possession to at least a portion of the bed by maintaining a series of dams on the riverbed over a period of 160 years.

3.2.1. Particular Holdings — Most of the New York cases which have considered the ownership of the beds of specific freshwater (non-tidal) streams have found the ownership to be held by the private riparian owners; a few have not, though their principle has, as earlier noted, been limited to the Hudson and Mohawk rivers.

3.2.1.1. Title to Beds of Freshwater Rivers Held to be in Private Riparian Owners — In *People v. Waite*, 103 Misc. 2d 204, 206, 425 N.Y.S.2d 462, 463 (St. Law. County Ct. 1979), a prosecution for trespass, it was said:

> The bed of non-navigable streams, or other bodies of water, is subject to private ownership and the title thereto, as a general rule, is vested in the proprietors of the adjoining uplands. . . [T]he law of the State of New

> York allows title to the bed of *navigable* waters which are tideless . . . to be vested in the riparian owners. (emphasis added).

In *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 401, 415-16, 94 N.E. 199, 203 (1911), the court concluded:

> [T]he common law rule governs with respect to the character of the Oswego river and being, within its [ebb-and-flow] definition, non-navigable in law, the state would not hold title to its bed by virtue of its sovereignty and could exercise no other right therein . . . except as such right might relate to the improvement of the channel and bed of the river for the purposes of navigation and commerce, as one for the advantage of the public easement. [The court described the ebb-and-flow test of streambed title as one] which, by long standing, has acquired the stability of a rule of property.

Id.

In *Smith v. Rochester*, 92 N.Y. 463, 479 (1883), the court approvingly quoted an extensive footnote to *Ex parte Jennings*, 6 Cow. 517, 543 (N.Y. Sup. Ct. 1826) to the effect that:

> Rivers not navigable, that is fresh waters of what kind soever, do of common right belong to the owners of the soil adjacent to the extent of their land length. . . . That this ownership of the citizen is of the whole river, *viz.* the soil and the water of the river, except that in his river where boats, rafts, etc. may be floated to market, the public have a right of way or easement.

In *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 184 (1880), the court wrote: "The Chenango River is a fresh water stream. It is the private property of the riparian owners. The public, in such streams, have an easement only for navigation and for floating of logs and timber."

In *Varick v. Smith*, 9 Paige Ch. 547, 554-57 (N.Y. Ch. 1842) (Oswego), the Vice Chancellor wrote that, notwithstanding some contrary intimations in *Canal Appraisers v. People*

ex rel. Tibbits, 17 Wend. 571 (N.Y. 1836), the ebb-and-flow test of state ownership applies in New York, and the latter case, in holding the bed of the Mohawk to be state owned, is authority only for the Mohawk itself. *See also Varick v. Smith*, 5 Paige Ch. 137 (N.Y. Ch. 1835) (Oswego).

In *Luce v. Carley*, 24 Wend. 450, 452-53 (N.Y. Sup. Ct. 1840) (Onondaga River), the court expressed concern that, if grants of stream-side lands were not construed to include the lands under water as well, "water gores would be multiplied by the thousands along the inland streams, small and great."

"[N]othing is better settled than that grants of lands, bounded upon rivers or streams where the tide does not ebb or flow, carry the exclusive right of the grantee to the middle of the stream unless . . . clearly and unequivocally [intended to] not extend beyond the water's edge." *Canal Appraisers v. People ex rel. Tibbits*, 13 Wend. 355, 371 (N.Y. Sup. Ct. 1835), *rev'd*, 17 Wend. 571, 612 (N.Y. Sup. Ct. 1836). This case was decided during the period when New York was still wavering on these issues. *See supra* § 3.

But cf.: *Commissioners of the Canal Fund v. Kempshall*, 26 Wend. 404, 416-17 (N.Y. Sup. Ct. 1841), where it was argued that it was unnecessary to the holding in *Tibbits* 17 Wend. 571, 612 (N.Y. 1836), *rev'g*, 13 Wend. 355, 371 (N.Y. Sup. Ct. 1835), to reject the suitability of the ebb-and-flow rule for New York, and it was declared that the rule in New York was "still . . . an open question": The court held that the Genesee River is privately owned.

See also:

Meadvin v. State, 22 A.D.2d 326, 327, 255 N.Y.S.2d 357, 359 (4th Dept. 1965) (Onondaga Creek).

People ex rel. New York, O. & W. Ry. v. State Tax Comm'n, 116 Misc. 774, 778, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (Susquehanna River).

3.2.1.2. Title to Beds of Freshwater Rivers Held to be in State — A number of early judicial opinions stated that the English common law view, regarding ownership of non-tidal but navigable fresh rivers as private, was unsuited to the conditions existing in New York. The application of the English rule in New York was, on that ground, sometimes de-

nied. However, the particular facts before the courts in those cases that declared the state to be the owner of non-tidal riverbeds happened to arise in relation to only the Hudson and Mohawk Rivers. Despite the broad language which those cases used in rejecting the English rule, the Court of Appeals later decided not to extend their precedential effect to other fresh water streams.

In *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461 (1865), the Court of Appeals questioned the authenticity of what is usually understood to be the English common law of freshwater stream ownership (as expounded by Lord Hale's famous treatise), stating that "much misapprehension has existed as to what doctrine he actually promulgated." *Id.* at 469. An extensive analysis of the English cases was provided, with the conclusion that, in England, "the flow and reflow of the tide is [only] *prima facie* evidence . . . of the fact that the river is navigable" for purposes of title, fishery rights, etc. *Id.* at 469-72. The court likewise reviewed the early New York lower court cases, observing at length that the previous holdings both embraced and rejected the view that fresh water, navigable in fact, belongs to the private riparian owners. It concluded its review of the contradictory authorities by selecting "as the settled law of the state" that "generally navigable" freshwater streams belong to the state. *See id.* at 500, 479-81. (This holding was later limited to the Mohawk River in *Smith v. Rochester*, 92 N.Y. 463, 481-82 (1883). *See* introductory paragraphs to this chapter, *supra*.)

See also:

Lehigh Valley R.R. v. Canal Board, 69 Misc. 251, 255, 125 N.Y.S. 227, 231 (1910): "[T]he fee of the bed of the [Seneca] river, as of all navigable streams, is vested in the state, and that [the private] plaintiff has no property rights therein." *aff'd on other grounds*, 146 A.D. 151, 157-58, 130 N.Y.S. 978, 982 (4th Dept. 1911), *aff'd*, 204 N.Y. 471 (1912).

Roberts v. Baumgarten, 110 N.Y. 380, 383, 18 N.E. 96, 97 (1888), stating in dicta that the English ebb-and-flow rule of navigability for ownership was "plainly inapplicable to our large inland rivers and lakes," and citing *Loomis*, *supra*, with approval.

In *Brown v. Scofield*, 8 Barb. 239, 243 (Sup. Gen. T. 1850), an action for obstructing a public river (the Canisteo) with a dam, it was said:

> The common law of England upon this subject, from its utter want of fitness and adaptation to the condition of things here, in our extended territory, with its numerous inland lakes and countless streams . . . has never been adopted, or if adopted, it has been in a form modified and improved to fit the condition of the country, and the wants of its inhabitants.

The judgment for the plaintiff was affirmed, but the court did not actually render a decision as to ownership of the bed of the river.

Canal Appraisers v. People ex rel. Tibbits, 17 Wend. 571, 612-20 (N.Y. 1836) (rejected the suitability of the ebb-and-flow test of "navigability" for New York). *See* § 3.4.3.

Canal Comm'n v. People ex rel. Tibbits, 5 Wend. 423, 460, 464 (N.Y. 1830), in which Beardsley, S. wrote:

> Almost the whole current of legislation in this state in regard to navigable rivers is adverse to this principle [of private ownership to the center of fresh water streams]. . . . Had the common law originated on this continent we should never have heard of the doctrine that fresh water rivers are not navigable above the flow of the tide; nor would our courts of justice have been called upon to compromise the interests of the community by sacrificing truth to technicality and substance to form.

The court held that the claimant failed to show title to a waterfall in the Mohawk River.

In 1830 and 1850, the Legislature authorized the Commissioners of the Land Office to convey "lands under the waters of navigable rivers or lakes." *E.g.*, Laws 1850, ch. 280, p. 621. *See People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 466 (1865). Inasmuch as there are no navigable in law (*i.e.*, tidal) lakes, these enactments make sense only if viewed as a legislative recognition and assertion of state title over all lakes

that are navigable in fact. There are, of course, "navigable in law" rivers, but it would be very peculiar to use the word "navigable" in these statutes to mean one thing in relation to rivers and an altogether different thing in relation to lakes. These statutes therefore also strongly imply a legislative recognition and assertion of state title over all *rivers* that are navigable in fact. *See id.*; *but cf. Varick v. Smith*, 9 Paige Ch. 546, 556 (N.Y. Ch. 1842) ("The legislature then should be deemed to use the term [navigable] in a legal sense when they are applying it to create or describe a legal right.").

Cf.:

Moyer v. State of New York, 56 Misc. 2d 549, 551, 289 N.Y.S.2d 114, 116 (N.Y. Ct. Cl. 1968). In holding a bay off of Lake Ontario to be property of the state, the court wrote: "Regarding the title to these lands, there is a presumption under the law that lands under navigable waters are the property of the State and the burden is upon the one claiming the contrary." The court was referring to lands under Lake Ontario which is, of course, non-tidal.

Johnson v. State, 151 A.D. 361, 363-64, 135 N.Y.S. 496, 498 (3d Dept. 1912) (title to uplands excluded bed of creek, where the original royal patent said "[e]xcepting Wood Creek which is reserved as a common highway for the benefit of the public." The later conveyance by the state of the same uplands, after forfeiture by royal patentee on the grounds of treason, likewise excluded the creek bed.).

3.3. Exceptions: Hudson, Mohawk Rivers and Boundary Waters —

3.3.1. Beds of Hudson and Mohawk are Owned by the State — The beds of the non-tidal portion of the Hudson and of the Mohawk River have been an exception to the general rule in New York that the owner of riparian land on a non-tidal navigable river owns to the center. The origins of this special treatment were learnedly discussed at some length in *Finch, Pruyn & Co. v. State*, 122 Misc. 404, 407-08, 203 N.Y.S. 165, 168-69 (N.Y. Ct. Cl. 1924) (Hudson at and above Glens Falls is navigable in fact), where the court mentioned three possibilities:

1. The original grants along these rivers were made by the

Dutch and, therefore, were to be construed under the civil law which did not convey the beds of streams.

2. The English common-law rule (the ebb-and-flow rule) was unsuited to our country and, therefore, was not applied to these rivers.

3. The size, location and commercial importance of these rivers demanded that they be excluded from the usual rule, an exclusion acquiesced in by all.

Whatever the explanation, the exception is fact.

In *Danes v. State*, 219 N.Y. 67, 72-74, 113 N.E. 786, 787-88, (1916) (Mohawk), this exception was said to have originated in the Dutch colonial practice of retaining the beds of the Hudson and Mohawk when making grants to settlers. Because New York State is now the sovereign successor to the British and Dutch, the state now generally owns the beds of these rivers.

In *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 499 (1865) (Mohawk), the court concluded that a conveyance of lands bounded by *any* actually navigable stream, including the Mohawk, would carry only to the bank and not the center of the stream, rejecting the English common law rule as unsuitable to conditions in New York. [This position was later repudiated by the Court of Appeals, which limited the *Loomis* holding to the Mohawk and Hudson Rivers (*See supra*, introduction to this chapter and § 3.2.1.2.).]

The state's ownership of the bed of such navigable (in law) streams extends up to the high water line. *People v. Tibbetts*, 19 N.Y. 523, 527 (1859) (Hudson at Troy; remanded for further evidence as to tidal effects at Troy). *Accord Stewart v. Turney*, 237 N.Y. 117, 125, 142 N.E. 437, 440 (1923) (dictum). *See also:*

New York Power & Light Corp. v. State of New York, 230 A.D. 338, 342, 245 N.Y.S. 44, 49 (3d Dept. 1930) (Mohawk is a public stream; title in state).

Accord People v. Page, 58 N.Y.S. 239, 241 (N.Y. Sup. Ct. 1897) (recognizing title to bed of Mohawk in state) *rev'd in part*, 39 A.D. 110, 56 N.Y.S. 834 (3d Dept. 1899).

Canal Comm'n v. People ex rel. Tibbits, 5 Wend. 423, 460, 463 (N.Y. Sup. Ct. 1830); 13 Wend. 355 (N.Y. Sup. Ct.

1835), *rev'd*, 17 Wend. 571, 609 (N.Y. Sup. Ct. 1841) ("not only the colonial government but the state authorities have considered the *bed* of the *Mohawk* as belonging to the public") (emphasis added).

3.3.2. Beds of Hudson and Mohawk Held *not* Owned by the State — Although the beds of the Hudson and Mohawk are mostly owned by the state, certain areas of the beds passed to private ownership as a result of conveyances which were intended to include the bed. *Williams v. City of Utica*, 217 N.Y. 162, 111 N.E. 468 (1916) (successful ejectment action by successor to grantee of bed). "[T]he question [is] whether King George having title to the bed of the stream did intend to and did convey the same . . . ." *Id.* at 169, 111 N.E. at 470.

3.3.3. Boundary Waters — To the extent that "our freshwater rivers and lakes formed territorial boundaries", the English rule assigning streambed ownership to the private riparian owners is "clearly, inapplicable." *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 413, 94 N.E. 199, 202 (1911).

"The title to the beds of boundary line streams, a *jus privatum*, is in the State [sic] as sovereign in trust for the people and so remains unless specifically granted." *People v. New York & Ontario Power Co.*, 219 A.D. 114, 116, 219 N.Y.S. 497, 500 (3d Dept. 1927) (St. Lawrence River).

See also:

Moyer v. State of New York, 56 Misc. 2d 549, 551, 289 N.Y.S.2d 114, 116 (N.Y. Ct. Cl. 1968) (bay off of Lake Ontario is property of the state).

Hawkins v. State, 54 Misc. 2d 847, 853, 283 N.Y.S.2d 615, 621 (N.Y. Ct. Cl. 1967) (East Bay, a portion of Lake Ontario).

Niagara Falls Power Co. v. Water Power and Control Comm'n, 267 N.Y. 265, 270, 196 N.E. 51, 53 (1935).

Long Sault Dev. Co. v. Kennedy, 212 N.Y. 1, 7, 105 N.E. 849, 851 (1914) (St. Lawrence River).

Gouverneur v. The National Ice Co., 134 N.Y. 355, 359, 31 N.E. 865, 867 (1892) (noting an exception for "our large fresh water lakes or inland seas" and "those lakes and streams which form the natural boundaries between us and foreign

nations").

In Re Commn's of State Reservation, 37 Hun. 537, 547 (N.Y. Sup. Ct. 5th Dept. 1885) (Niagara River).

Champlain & St. L. R.R. v. Valentine, 19 Barb. 484, 489-92 (N.Y. Sup. Ct. 1853) (Lake Champlain).

Canal Appraisers v. People ex rel. Tibbits, 17 Wend. 571, 623 (N.Y. Ct. for the Correction of Errors 1836) (dictum).

3.4. Interpretation of Deeds — In general, grants bounded by *tidal* waters carry only to the high water marks, unless the language clearly indicates a different intent. *Tiffany v. Town of Oyster Bay*, 209 N.Y. 1, 9, 102 N.E. 585, 587 (1913); *Sage v. Mayor*, 154 N.Y. 61, 69-70, 47 N.E. 1096, 1098 (1897) (hence, the rule that lands under tidal waters are generally not deemed to have passed into private ownership). *See supra* § 2.2. By contrast, grants bounded by *non-tidal* streams are usually deemed to carry to the center of the stream. The weight of more recent authority holds that deeds to lands bounding all but the largest freshwater lakes and ponds carry to the center of the lake or pond, unless otherwise expressed.

The main interpretive distinction made by the cases is between grants that "touch" the water and grants which extend only to a point on dry land at the water margin. Only those grants which "touch" the water are deemed to extend *under* it and convey submerged lands as well.

3.4.1. Grant Framed so as to Touch the Water: Title to Center — "If the boundary touches the water or is along the water or by the water, and not on dry land, the presumption remains that title is carried to the center of the river or pond." *White v. Knickerbocker Ice Co.*, 254 N.Y. 152, 157, 172 N.E. 452, 454 (1930).

In *Brant Lake Shores, Inc. v. Barton*, 61 Misc. 2d 902, 905, 307 N.Y.S.2d 1005, 1009-10 (N.Y. Sup. Ct. 1970), the court wrote:

> A description using the words 'low water mark', in the absence of an express reservation, carries title to the center of the lake or pond . . . [but since the grantor] conveyed only to high water mark [the grantee] only acquired title in said premises to high water mark, which precluded title

> in and to any land beyond high water mark.

In *White v. Knickerbocker Ice Co.*, 254 N.Y. 152, 156, 172 N.E. 452, 453 (1930), the court stated:

> If the parties mean to exclude the land under water [of small *non-navigable* lakes and ponds], they should do so by express exception; the restriction ought to be framed in very plain and express words. . . . A description carrying the boundary 'by the shore' is such an express restriction; likewise 'to the bank'. On the other hand, 'along said pond,' . . . carried title to the center of the pond. [Citations omitted.] [In sum, a] description . . . so framed as to *touch* the water of the river or pond, carries title to the center thereof.

Id. at 157, 172 N.E. at 454 (emphasis added). The court held that the deed to shore lands of Rockland Lake included title to the bed.

In *Stewart v. Turney*, 237 N.Y. 117, 121, 142 N.E. 437, 438-39 (1923), the court said of the rule that "the grantee takes title to the center of the highway or to the thread of [a non-tidal] stream or lake. A presumption founded originally upon the assumed intent of the parties, it has now become a rule of property." Still, however, the presumption may be "negatived by express words" or a clear description excluding the bed lands.

> The rule of the common law of this state (enlarging or extending that of England) that the title to the bed of navigable rivers, not tidal, passed to the grantees of the adjacent banks has not heretofore been applied to the [royal] grants of the banks of the Hudson and Mohawk rivers.

Danes v. State, 219 N.Y. 67, 71, 113 N.E. 786, 787 (1916).

However, in interpreting an English conveyance of lands described as "lying and being . . . *on both sides* of the Mohawk river" (emphasis added) and then described more particularly by metes and bounds, the court in *Williams v. City*

of Utica, 217 N.Y. 162, 170-71, 111 N.E. 468 (1916), held that the conveyance was intended to include the bed of the river, stating: "[T]his general location of the tract [by reference to the river] ought not be construed as overruling definite and exact boundary lines or as excluding land which was included within those boundary lines." *Id.* at 470.

In *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 401, 416, 94 N.E. 199, 204 (1911), the court stated that, presuming a consideration was paid, grants from the state should not be construed "with any extraordinary strictness as against the grantee." In considering the effect of a grant made by the state, therefore, it applied the "old and well-settled rule" that "where a grant has no other boundary on the river side but the stream itself, . . . the legal presumption is that it was intended to convey to the middle of the stream." The grant from the state which the court had before it described the boundary as running "to the said river and then up and along the same." This language, the court held, conveyed a tract of land "bounded . . . by the center of the Oswego river." By contrast, "a boundary line, which is described as 'along the *shore*', or 'along the *bank*,' of a fresh-water stream would not extend the grant to the center." *Id.* at 417, 94 N.E. at 204.

In *Varick v. Smith*, 9 Paige Ch. 546 (N.Y. Ch. 1842), in passing on a map description contained in a deed from the state, the Vice Chancellor noted that the lot conveyed was, on the map, "laid down and delineated as lying adjacent and extending *to* the Oswego River." Accordingly, the Vice Chancellor wrote, it "must be taken as though the premises were described by words in the grant itself, as extending to, and bounded on the river." *Id.* at 549. The court held that the granted lands were deemed to include the bed of the river.

Luce v. Carley, 24 Wend. 450, 452-53 (N.Y. Sup. Ct. 1840) (Onondaga River: concern that, if grants of stream-side lands were not construed to include the lands under water as well, "water gores would be multiplied by the thousands along the inland streams, small and great.").

See also:

Hartwood Syndicate, Inc. v. Passaic Valley Council, Boy Scouts of America, 80 A.D.2d 871, 872, 457 N.Y.S.2d 16, 17

(2d Dept. 1981) (Beaver Dam Pond/Reservoir in private ownership).

Town of Guilderland v. Swanson, 29 A.D.2d 717, 718, 286 N.Y.S.2d 425, 427 (3d Dept. 1968), *aff'd*, 24 N.Y.2d 872, 249 N.E.2d 467, 301 N.Y.S.2d 622 (1969).

Meadvin v. State, 22 A.D.2d 326, 327, 255 N.Y.S.2d 357, 359 (4th Dept. 1965) (Onondaga Creek).

Waters of White Lake, Inc. v. Fricke, 282 A.D. 333, 336, 123 N.Y.S.2d 400, 403 (3d Dept. 1953), *aff'd*, 308 N.Y. 899, 126 N.E.2d 568 (1955)

Seneca Nation of Indians v. Knight, 23 N.Y. 498 (1861) (concern about "water gores").

Ledyard v. Ten Eyck, 36 Barb. 102, 125 (N.Y. Sup. Ct. 1862) (Cazenovia Lake).

Lowndes v. Dickerson, 34 Barb. 586, 592 (Sup. Gen. T. 1861) (dicta).

3.4.2. Grant Extending to a Point or Line on Dry Land: Low Water Line —"[I]f the description runs the title along dry land, such as the *bank* or the *shore*, there is an express restriction which excludes or reserves title in the river or pond." (emphasis added). *White v. Knickerbocker Ice Co.*, 254 N.Y. 152, 157, 172 N.E. 452, 454 (1930). Accordingly, the private ownership extends only to the low water line.

In *Carlino v. Barton*, 76 Misc. 2d 240, 242, 349 N.Y.S.2d 535, 539 (N.Y. Sup. Ct. 1973), the court held that a deed bounding land "along the shores" of a small, inland freshwater lake conveys title to the low water line.

In *People v. System Properties, Inc.*, 2 N.Y.2d 330, 141 N.E.2d 429, 160 N.Y.S.2d 859 (1957), the court had before it an English conveyance of lands "along the Banks" of the Ticonderoga River. In interpreting this conveyance, the court observed:

> [A]ccording to the English common law as of about 1764 the owner of land on each side of a non-tidal river . . . owned to the center of the stream and if he owned land on both sides he owned the whole river *unless his grant specifically and in terms excluded the bed* . . . . [There is] no real difference in this respect between the English

> and American colonial law and the modern law of New York State.

Id. at 341, 141 N.E.2d at 433, 160 N.Y.S.2d at 865 (emphasis added). However, the court concluded that "running the boundary line *along the bank* of the stream [as in this case] results in an exclusion of the land under water." *Id.* at 342, 141 N.E.2d at 433, 160 N.Y.S.2d at 865 (emphasis added).

Halsey v. McCormack, 13 N.Y. 296 (1855) (grant to "bank" of a creek goes to the low water mark in order to secure use of the water to the riparian owner).

Accord Child v. Starr, 4 Hill 369, 376 (N.Y. Sup. Ct. 1842); *Starr v. Child*, 5 Denio 599, 602-03 (N.Y. Sup. Ct. 1846). ("A grant, therefore, which is bounded by the *shore* of a freshwater river, conveys the land to the water's edge, at low-water.")

See also:

Meadvin v. State, 22 A.D.2d 326, 328, 255 N.Y.S.2d 357, 360 (4th Dept. 1965) (Onondaga Creek).

Johnson v. State, 151 A.D. 361, 363, 135 N.Y.S. 496, 498 (3d Dept. 1912) (royal patent said "Excepting Wood Creek which is reserved as a common highway for the benefit of the public").

Geneva v. Henson, 195 N.Y. 447, 88 N.E. 1104 (1909), *aff'd*, 140 A.D. 49, 124 N.Y.S. 588 (4th Dept. 1918).

3.4.3. Exceptional Cases — "The rule is well established that nothing passes in such grants [of lands on both sides of the Hudson River] . . . by implication, or except such as is expressed in unequivocal language . . . ." *West Virginia Pulp & Paper Co. v. Peck*, 189 A.D. 286, 293, 178 N.Y.S. 663, 668 (3d Dept. 1919), *modified*, 190 A.D. 891, 178 N.Y.S. 663 (1919). "The Queen Anne patent . . . clearly did not have the effect of conveying the bed of the river." *Id.* at 670, 178 N.Y.S.2d at 670.

In *Wheeler v. Spinola*, 54 N.Y. 377, 385 (1873), the court wrote that "a boundary upon . . . [a freshwater pond] does not carry title to its center but only to the low-water mark. Such is the rule as to boundaries upon natural ponds and lakes," noting that the rule applied to ordinary freshwater streams

would not apply to a fresh water pond.

In *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 480, 500 (1865), the Court of Appeals paraphrased and approved the earlier statement by Senator Beardsley in *Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. 571, 612 (N.Y. Ch. 1836):

> Where patents have been bounded upon navigable fresh water rivers in this state, and nothing appears from the grant that the state intended to part with the bed of the river, the patentee shall not by an implied grant take the river to the exclusion of the state, where the state wishes to use it for public purposes.

Remember, however, that *Loomis* and its line of reasoning — rejecting application of the English common law rule in New York — was confined to the Hudson and Mohawk rivers in *Smith v. Rochester*, 92 N.Y. 463, 481-82 (1883).

3.5. Private Title by Prescription or Adverse Possession — may be acquired in state-owned lands. This includes lands under non-tidal waters. The general rule is that if title could be acquired to the particular lands by a grant from the state, then title can be acquired by adverse possession (a "lost grant") as well. As already described in §§ 3.2 and 3.4, *supra*, the state not only *can* grant title to lands under fresh waters, but there is a presumption that it *does* make such grants whenever it conveys the adjoining uplands. The question addressed in the cases below is distinct from the question of whether the *public right of passage* could be extinguished by prescription or adverse possession. *See infra* § 4.6.

In *Arnold's Inn, Inc. v. Morgan*, 63 Misc. 2d 279, 285, 310 N.Y.S.2d 541, 548 (Sup. Ct. 1970), *modified*, 35 A.D.2d 987, 317 N.Y.S.2d 989 (2d Dept. 1970), the court said, in respect to lands under the tidal waters of Manhasset Bay: "The land involved herein, however, is alienable [citations omitted] and therefore, since the Town could divest itself of title by an express grant it could also lose title by prescription."

But cf. Hawkins v. State, 54 Misc. 2d 847, 853, 283

N.Y.S.2d 615, 621 (N.Y. Ct. Cl. 1967) ("the State's sovereign title [to the bed of Lake Ontario] is inalienable except by grant").

In *People v. System Properties, Inc.*, 2 N.Y.2d 330, 343, 141 N.E.2d 429, 434, 160 N.Y.S.2d 859, 866 (1957), the Court of Appeals stated that, by maintenance of a dam on a state-owned streambed, title to the streambed could be acquired by adverse possession because (1) "this dam standing on a rocky ledge in the river is at a place where its existence . . . interferes with no public use," and (2) the state itself had conveyed other nearby portions of the same river.

Nevertheless, the court in *System Properties* wrote, "[t]he rule appropriate to some situations is that a grant to a private individual may not be presumed or adverse possession adjudicated as to lands theretofore appropriated to a public use by the state since such lands are inalienable (*Burbank v. Fay*, 65 N.Y. 57, 66 (1875) *et seq.*)." *Id.* at 342-43, 141 N.E.2d at 434, 160 N.Y.S.2d at 860.

In *Burbank v. Fay*, 65 N.Y. 57 (1875), the court wrote that: "Where no express grant can be allowed, the law will not resort to the fiction of an implied grant so as to create a prescriptive right . . . ." *Id.* at 67. "The principles thus laid down as to highways on the land, are plainly applicable to navigable waters." *Id.* at 71. The court held that no prescriptive right to canal waters, by analogy to natural streams existed.

See also:

Carlino v. Barton, 76 Misc. 2d 240, 243, 349 N.Y.S.2d 535, 540 (N.Y. Sup. Ct. 1973), in which the court found title by prescription to the area between the low and high water line on a small, inland lake.

New York v. Wilson & Co., 278 N.Y. 86, 15 N.E.2d 408 (1938) (lands under margins of tidal waters were held to be alienable).

Wheeler v. Spinola, 54 N.Y. 377, 387 (1873), in which the court refused to find adverse possession of underwater lands where the "land was never inclosed . . . never cultivated and never possessed except . . . temporary occupancy for such an unimportant purpose [cutting thatch once a year], really nothing but trespasses repeated from year to year."

3.6. Title to Lake Beds — The ownership of lakebeds, like title to streambeds, depends fundamentally on the history of conveyances from the root of title down to the present. In litigated cases, lake bed title is generally found to be held by the private riparian owners, except in the case of large lakes, where title has generally been adjudicated to be in the state.

In *Granger v. City of Canandaigua*, 257 N.Y. 126, 177 N.E. 394 (1931), a dispute over lake bed title, the court said:

> The title to the bed of large lakes [George, Seneca, Cayuga, Oneida] remains in the state; of the small lakes in private ownership. Between the two groups come lakes like Onondaga, Otsego and Canandaigua. Where shall we place them? . . . Except as applied to comparatively small and narrow bodies of water, resembling rivers, rather than lakes, it seems . . . contrary to our institutions to say that fresh water lakes are the subject of private ownership.

Id. at 130-31, 77 N.E. at 396.

The court characterized its decision in *Granger* as a "practical construction" of the original conveyance of the alleged private title to the lake bed, *viz.* a 1786 grant from New York to Massachusetts known as the "Treaty of Hartford." *Id.* The court held that "title to the bed of Canandaigua Lake is in the State of New York in trust for all the people." *Id.* at 132, 77 N.E. at 296. (The plaintiffs had sued to restrain the city from entering upon and filling the lake bed in violation of their alleged private title rights.)

In *White v. Knickerbocker Ice Co.*, 254 N.Y. 152, 156-57, 172 N.E. 452 (1930), the court held that a deed to shore lands of Rockland Lake included title to the bed. "If the parties mean to exclude the land under water [of small *non-navigable* lakes and ponds], they should do so by express exception." *Id.* at 156, 172 N.E. at 453. " [A] description . . . so framed as to *touch* the water of the river or pond, carries title to the center thereof." *Id.* at 156, 172 N.E. at 454 (emphasis added).

In *Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437 (1923), the court wrote: "Were it necessary we would hold, however, that with regard to a grant of land on Cayuga lake an exception should be made to the common-law rule [presumptively

extending riparian ownership to the center of a lake] . . . ." *Id.* at 123, 142 N.E. at 439. "[W]e hold that under a grant from the state the grantee took to the low-water mark on Lake Cayuga." *Id.* at 130, 142 N.E. at 442. *See also New York State Water Resources Comm'n v. Liberman*, 37 A.D.2d 484, 488, 326 N.Y.S.2d 284, 288 (3d Dept. 1971) (The bed of Cayuga Lake "is held by the State in its sovereign capacity in trust for the people of the state.").

In *Gouverneur v. National Ice Co.*, 134 N.Y. 355, 359, 31 N.E. 865, 867 (1892), it was said: "Natural ponds and small lakes are private property. They pass by grant of land in which they are included." The court held that the riparian owners of Croton Pond (about 45 acres) own to the center of the pond.

In *People ex rel. Burnham v. Jones*, 112 N.Y. 597, 606, 20 N.E. 577, 579 (1889), the court wrote: "[I]t is conceded by both parties that [private ownership] extends only to the high-water mark on inland seas or large navigable bodies of water like those of Lake Ontario [citation omitted] and that the title to all lands beyond high-water mark or under water is in the state."

In *Smith v. Rochester*, 92 N.Y. 463 (1883), an action to restrain the diversion of waters, the court stated in its discussion that the "property to the soil under the waters of Hemlock Lake [7 miles long x ½ mile wide] were acquired by and belong to the riparian owners" by virtue of the grant, known as the Treaty of Hartford, from New York to Massachusetts in 1786. *Id.* at 476.

Although the court (1) "stated in passing" that the English rule as to freshwater titles is "inapplicable to the vast freshwater lakes or inland seas of this country or the streams forming the boundary line of states," *Id.* at 479, and (2) "affirmed" that the term navigable water "has by common consent a more enlarged signification in this country and is here held to mean all such waters as are actually navigable, whether fresh or salt," *Id.* at 479-80, it nevertheless concluded that "the decided preponderance of judicial authority in the State favors the application of the [English] common-law rule to the navigable waters of this State." *Id.* at 481. The court

limited the *Loomis* case to its facts (*i.e.*, the Mohawk), *see supra*, § 3.2.1.2. , and the bed of Hemlock Lake was declared to belong to its riparian owners. *Id.* at 482.

In *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, 4 N.Y. St. Rep. 380, 383 (N.Y. Sup. Ct. 1887) (Keuka Lake navigable), the court wrote: "The rule is that riparian owners of lands adjoining fresh water, non-navigable and navigable streams, and small lakes, within the state, take title to the land underneath the water abutting upon their premises."

In *Brant Lake Shores, Inc. v. Barton*, 61 Misc. 2d 902, 904-05, 307 N.Y.S.2d 1005, 1009-10 (N.Y. Sup. Ct. 1970), the court wrote: "[A] conveyance bounded by a small inland lake or pond carries title to the center or thread of the current unless there is expression to the contrary." If, however, the grantor "conveyed only to high water mark . . . [the grantee] only acquired title in said premises to high water mark, which precluded title in and to any land beyond high water mark."

In *Hawkins v. State*, 54 Misc. 2d 847, 852-53, 283 N.Y.S.2d 615, 621 (N.Y. Ct. Cl. 1967), the court stated that to prove title to a portion of a bay off Lake Ontario, the claimant must show that "the State had relinquished, alienated or transferred its ownership *by express grant* . . . the State's sovereign title is inalienable except by grant." (emphasis added)

In *Ledyard v. Ten Eyck*, 36 Barb. 102 (N.Y. Sup. Ct. 1862), the bed of Cazenovia Lake was held to be the property of the abutting riparians.

But cf. Wheeler v. Spinola, 54 N.Y. 377, 385 (1873), in which the court stated that the rule applied to ordinary freshwater streams would not apply to a freshwater pond, stating: "A boundary upon [a freshwater pond] does not carry title to its center but only to the low-water mark. Such is the rule as to boundaries upon natural ponds and lakes." [Later called obiter dictum in *Gouverneur v. National Ice Co.*, 134 N.Y. 355, 361, 31 N.E. 865, 867 (1892).]

See also Canal Comm'rs v. People ex rel. Tibbits, 5 Wend. 423, 447 (N.Y. Sup. Ct. 1830), which provided the following extended discussion:

> The principle [that private title presumptively goes to the

> center of freshwater bodies] itself does not appear to be sufficiently broad to embrace our *large fresh water lakes, or inland seas*, which are wholly unprovided for by the common law of England. . . .(emphasis in original) [O]ur own local law appears to have assigned the shores down to the *ordinary low water mark* to the riparian owners, and the beds of the lakes with the islands therein to the public.

(emphasis added). [Note: This quoted language was denominated "purely dictum," but followed, in *Stewart v. Turney*, 237 N.Y. 117, 123, 142 N.E. 437, 439, (1923).] The issue in *Tibbits* was title to a waterfall in the Mohawk River.

In 1815, the Legislature authorized the Commissioners of the Land Office to convey "lands under water on navigable lakes." 1815 N.Y. Laws CXCIX. *See People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 466 (1865); Since there are no lakes that are "navigable in law" (*i.e.*, tidal), this enactment makes sense only if viewed as a legislative recognition and assertion of state title over all lakes that are navigable in fact.

Other Cases and Authorities are:

Hartwood Syndicate, Inc. v. Passaic Valley Council, Boy Scouts, 80 A.D.2d 871, 872, 437 N.Y.S.2d 16, 17 (2d Dept. 1981) (Beaver Dam Pond/Reservoir in private ownership).

Allen v. Potter, 64 Misc. 2d 938, 938-39, 316 N.Y.S.2d 790, 792 (N.Y. Sup. Ct. 1970), *aff'd*, 37 A.D.2d 691, 323 N.Y.S.2d 409 (4th Dept. 1971) (title on Canandaigua Lake extends to low water line).

Town of Guilderland v. Swanson, 29 A.D.2d 717, 718, 286 N.Y.S.2d 425, 426-27 (3d Dept. 1968), *aff'd*, 24 N.Y.2d 872, 249 N.E.2d 467, 301 N.Y.S.2d 622 (1969) (recognizing rules of construction applicable to streams (*see supra* § 3.4) as applicable to lakes).

Knight v. Ciarlone, 200 N.Y.S.2d 805 (N.Y. Sup. Ct. 1959) (title to lands on Lake George extend to low water line).

Waters of White Lake v. Fricke, 282 A.D. 333, 336, 123 N.Y.S.2d 400, 402-03, (3d Dept. 1953), *aff'd*, 308 N.Y. 899, 126 N.E.2d 568 (recognizing rule "a conveyance of land bounded by a small inland lake or pond usually carries title to the

center or the thread of the current unless there is expression to the contrary.").

Ransom v. Shaeffer, 153 Misc. 199, 274 N.Y.S. 570 (N.Y. Sup. Ct. 1934), *modified*, 243 A.D. 858, 279 N.Y.S. 720 (4th Dept. 1935) (title to lands on Lake Ontario extends to low water line).

Shandalee Camp, Inc. v. Rosenthal, 133 Misc. 502, 505, 233 N.Y.S. 11, 14-15 (N.Y. Sup. Ct. 1929) (Shandelee Lake, 4000 feet long and 1,200 feet wide is of a sort that is "subject to private ownership").

Moore v. Day, 199 A.D. 76, 191 N.Y.S. 731 (1921), *aff'd*, 235 N.Y. 554, 139 N.E. 732 (1923) (bed of Lake Champlain is owned by state).

Champlain & St. L. R.R. v. Valentine, 19 Barb 484, 489-92 (N.Y. Sup. Ct. 1853) (grant of lands bounded by Lake Champlain extends to the low water line).

See also:

4 Op. N.Y. Comp. 412 (1948) (each case depends on its particular facts).

Colson, *Title to Beds of Lakes in New York*, 9 Cornell L.Q. 159, 288 (1924).

Andrews, *Lands Under Water in New York*, 16 Cornell L.Q. 277 (1931).

Chapter IV.

THE PUBLIC'S RIGHT OF PASSAGE ON STREAMS

4. The Public's Right of Passage on Streams — While ownership of the beds of non-tidal streams is usually deemed to be in the private riparian owners, the private ownership is subject to a public right of passage if the stream is generally usable for such purpose. This "servitude of the public interest" has been consistently recognized from the earliest days of New York navigation law. *Palmer v. Mulligan*, 3 Cai. R. 307, 319 (N.Y. Sup. Ct. 1805). "The Hudson at Stillwater," wrote Chancellor Kent in his seminal dictum, "is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a *public highway* for public uses . . . ." *Id.* (emphasis added). In other words, as the Court of Appeals later reaffirmed: "The right of property in the soil or bed of a navigable river or arm of the sea, and the right to use the waters for the purposes of navigation, are *entirely separate and distinct*." *People v. Vanderbilt*, 26 N.Y. 287, 292 (1863) (emphasis added).

4.1. The English Common Law — held that "title to the soil of the sea, or of the arms of the sea, or of tidal rivers, was in the crown, subject to an easement in favor of the public for passage, or transportation; while *fresh* water rivers belonged to the owners of their banks, *also, subject to the use of the public* as navigable highways." *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 401, 412, 94 N.E. 199, 202 (1911) (emphasis added). Whether title to the bed was in the crown or in the private riparian owners, there was *never* any "distinction against the public right of passage and transportation." *Id.*

Thus, "[w]hether salt, or fresh, water streams, if they were large enough to be *capable of common passage* and thus, in fact, were navigable, they were regarded as *common highways*, which might not be impeded . . . . A stream to be exclusively owned by the riparian owner, must be too small to be navigable in fact." *Id.* (emphasis added).

4.2. The Public Right of Passage on New York Streams — is deeply rooted. It is rare in New York to find a judicial statement that stream beds can be privately owned without the further statement, immediately appended, that the private ownership is subject to the public right of passage.

4.2.1. Cases Affirming the Public Right of Passage on Streams — typically refer to the public right as an "easement" or "right of way" for "travel" or "passage" as on a "highway".

"A public right on a stream is a right of travel as on a public highway." *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 361, 16 N.Y.S.2d 812, 817 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940) (Iona Bay, Doodletown Creek and Popolopen Creek are navigable in fact).

"A public right on a stream is the right of travel as on a public highway." *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (Susquehanna River).

> The proprietary interest of the riparian owner is subordinate the public easement of passage and the state may be regarded as a trustee of a special public servitude . . . [T]he legislature may direct the performance of acts by state officers, which tend to promote the public right of passage and transportation, without subjecting the state to liability.

Fulton Light, Heat & Power Co. v. New York, 200 N.Y. 400, 418, 94 N.E. 199, 204 (1911).

"The public has an easement in such waters for the purposes of travel as upon a public highway. . . ." *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, 4 N.Y. St. Rep. 380, 383 (5th Dept. 1887), *aff'd*, 22 N.E. 1126 (1889) (Keuka Lake navigable by small vessels).

"The common right of navigation in navigable rivers of the State [sic] is in the people, and the equality of their right to use them for that purpose cannot be abridged except by . . . the legislature." *In Re Comm'rs of State Reservation*, 37 Hun.

537, 550 (N.Y. Sup. Ct. 1885).

"[T]he rights and interests of the public, such as fishing, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign . . . ." *Smith v. City of Rochester*, 92 N.Y. 463, 480 (1883).

"[T]his ownership of the citizen is of the whole river, *viz.* the soil and the water of the river, except that in his river where boats, rafts, etc. may be floated to market, the public have a right of way or easement." *Smith v. Rochester*, 92 N.Y. 463, 479 (1883) (approvingly quoting Judge Cowen's footnote in *Ex parte Jennings*, 6 Cow. 518, 543 (N.Y. Sup. Ct. 1826)).

> As early as the year 1802, an act was passed declaring the waters of certain streams, therein mentioned, to be public highways. . . . Numerous acts of a similar character are found in our statute books, containing restrictions upon the use of streams declared to be public highways, and of the waters thereof.

People ex rel. Loomis v. Canal Appraisers, 33 N.Y. 461, 467 (1865).

"[T]he doctrine of riparian ownership does not give a right to the bed of the stream, and the use of the water incompatible with the superior rights of the public, for the purposes of navigation and commerce." *Varick v. Smith*, 9 Paige Ch. 547, 552 (N.Y. Ch. 1842).

The private "right of property [in submerged lands] is in all respects analogous to the property in fee of any land subject to a public or private right of way, or any similar easement." *Commissioners v. Kempshall*, 26 Wend. 404, 413 (N.Y. 1841).

"The public right is one of passage . . . as in a common highway. It is called by the cases an *easement*." *Ex parte Jennings*, 6 Cow. 518, 527-28 (N.Y. Sup. Ct. 1826).

"Individuals who occupy the adjoining banks may use the waters for their own emolument, so far only as it can be done without any material interruption of the public use." *Shaw v. Crawford*, 10 Johns. 236, 238 (N.Y. Sup. Ct. 1813).

See also:

"Regardless of who owns legal title to the underlying land, a navigable waterway is a form of public highway." *Town of Hempstead v. Oceanside Small Craft Marina Inc.*, 64 Misc. 2d 4, 6, 311 N.Y.S.2d 668, 671 (N.Y. Sup. Ct. 1970), *rev'd on other grounds*, 38 A.D.2d 263, 328 N.Y.S.2d 894 (2d Dept. 1972), *aff'd*, 32 N.Y.2d 859 (1973).

Lehigh Valley R.R. v. Canal Bd., 146 A.D. 151, 159, 130 N.Y.S. 978, 983 (4th Dept. 1911), *modified*, 204 N.Y. 471, 97 N.E. 964 (1912).

4.2.2. The Exceptional Lake Cases — There are several cases which appear to limit boating on small lakes to the owners of the lake bottom, each being entitled to use only the surface area above the portion of lake bottom actually owned. It appears to be assumed in these cases that the lakes in question are non-navigable, even though they may be usable by small boats. Perhaps significantly, the lakes in question do not appear to have been ones which connect with other waterways and, being more or less surrounded by private land, they would not permit a boater to "navigate" *from or to* any place in particular; they are, in that sense, entirely different from "navigable" streams. *See Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 826 (2d Dept. 1960) ("consideration may be given to the existence or absence of termini at and from which the public may enter and leave said waterway").

Apart from the distinction based on an absence of termini, the exceptional lake cases appear to be irreconcilable with the general common-law principles, which they neither cite nor attempt to distinguish. The cases are: *Mix v. Tice*, 164 Misc. 261, 267, 298 N.Y.S. 441, 448 (N.Y. Sup. Ct. 1937); *Shandalee Camp, Inc. v. Rosenthal*, 133 Misc. 502, 233 N.Y.S. 11 (N.Y. Sup. Ct. 1929); *Calkins v. Hart*, 219 N.Y. 145, 113 N.E. 785 (1916) (trespass to take ice over riparian neighbor's portion of lake); *Commonwealth Water Co. v. Brunner*, 175 A.D. 153, 161 N.Y.S. 794 (2d Dept. 1916); and *Tripp v. Richter*, 158 A.D. 136, 139, 142 N.Y.S. 563, 565 (3d Dept. 1913). *See contra*, *Smith v. Rochester*, 92 N.Y. 463, 479-80 (1883) (dictum); *Crooked Lake Nav. Co. v. Keuka Nav. Co.*, 4

N.Y. St. Rep. 380, 383 (5th Dept. 1887), *aff'd*, 22 N.E. 1126 (1889) ("The public has an easement in such waters for the purposes of travel as upon a public highway. . . ."); *See also*, *Waters of White Lake, Inc. v. Fricke*, 282 A.D. 333, 123 N.Y.S.2d 400 (3d Dept. 1953), *aff'd*, 308 N.Y. 899, 126 N.E.2d 568 (1955); and *Ten Eyck v. Town of Warwick*, 75 Hun. 562, 567 (N.Y. Sup. Ct. 1894) (stating, in effect, that Greenwood Lake "is in no legal or just sense of the term navigable water").

4.3. Private Lands Which Are Subject to Public Right of Passage — are those which are passed over by streams or other waters that are "navigable in fact". The cases do not define any particular outer limit (such as the high water mark) to which the easement for public passage extends, though it appears to apply at least to those lands within the lines of high water.

4.3.1. The Requirement of "Navigability in Fact" — In order for a waterbody to be subject to the public's right of passage, it must be "navigable in fact". *See supra* § 2.3. "The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact, whether they are susceptible, or not, of use as common passage for the public." *People v. Platt*, 17 Johns. 195, 211 (N.Y. Sup. Ct. 1819).

A person's "right to navigate and anchor his boat in [an artificially dredged] basin depends upon whether, prior to the aforesaid dredgings, the creek which traversed the area was navigable in fact . . . ." *Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 825 (2d Dept. 1960) (action by the bed-owner for trespass).

"The servitude of privately owned lands forming the banks and bed of a stream to the interest of navigation is a *natural servitude* confined, to such streams as in their ordinary and natural condition are *navigable in fact*." *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (emphasis added) (Susquehanna River). However, the court later added: "The capacity to float logs, singly or together, to run rafts

however small, gives to all the public this easement . . . ." *Id.* at 776, 191 N.Y.S. at 467.

"A stream, to be exclusively owned by the riparian owner, must be too small to be navigable, in fact." *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E. 199, 202 (1911).

"[R]ivers of sufficient magnitude and capacity for navigation are public highways, and . . . [the rights of private owners are] subject to the easement of the public, which they cannot lawfully interrupt." *In Re Comm'r of State Reservation*, 37 Hun. 537, 545 (N.Y. Sup. Ct. 1885).

"[W]here boats, rafts, etc. may be floated to market, the public have a right of way or *easement*." *Smith v. Rochester*, 92 N.Y. 463, 479 (1883) (quoting with approval Judge Cowen's footnote in *Ex parte Jennings*, 6 Cow. 518, 543 (N.Y. Sup. Ct. 1826)).

In *Morgan v. King*, 35 N.Y. 454 (1866), it was held that stream users would have no action against another riparian owner for obstructing a stream which, without artificial improvements, was incapable of transporting, in a condition fit for market, the products of the forest, mines, or agriculture along its banks because the stream was not, in its natural state, a public highway.

See also Brant Lake Shores, Inc. v. Barton, 61 Misc. 2d 902, 907, 307 N.Y.S.2d 1005, 1012 (N.Y. Sup. Ct. 1970), which considered the effect of a legislative declaration that certain stream and lake waters are "public highways for the purpose of floating logs, timber and lumber down those streams . . . ." The court said: "nor does . . . [the enactment] give anyone a greater right to use the waters of Brant Lake than one had prior to such designation." *Id.*

4.3.2. Physical Extent of the Public Right — Private ownership on *tidal* waters generally runs only to the high water line and, correspondingly, the public right of passage and use likewise runs from the tidal waterbody itself to the high water line. *E.g.*, *Tucci v. Salzhauer*, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721, 723 (2d Dept. 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973); *In re City of New York*, 216 N.Y. 67, 110 N.E. 176 (1915). The high water line

plays no similar key role in demarcating the usual ownership boundaries on *non-tidal* waters. *See supra*, § 3.2. The New York courts have, however, generally recognized that the easement for public passage covers at least those lands within the lines of high water.

In *Trustees of Freeholders and Commonalty of the Town of Southampton v. Heilner*, 84 Misc. 2d 318, 329, 375 N.Y.S.2d 761, 771 (N.Y. Sup. Ct. 1975), the court concluded that, because Shinnecock Bay was non-tidal when the riparian owners took title, they acquired ownership to the low water mark, but that such ownership was "subject to a right of the public for navigation and connected uses up to the present high-water mark."

In *Bacorn v. State*, 20 Misc. 2d 369, 373-374, 195 N.Y.S.2d 214, 219-20 (N.Y. Ct. Cl. 1959), the court rejected a claim of compensation for lands at the margin of the navigable Chemung River. The state had appropriated the lands for use in a flood control project. Referring to the stream-side lands as part of the "bed", and therefore subject to the public right, the court said: "The fact that there was sometimes no water over this particular area does not establish that it does not constitute a part of the bed of the Chemung River." It concluded that "whether claimants . . . owned title under the bed of the stream is immaterial" because, title or no, the state's use of the lands would be "a proper exercise of the State's [sic] power over public waters" for which no compensation would be required. *Id.*

In *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (Susquehanna River), the court spoke of "[t]he servitude of privately owned lands forming the *banks and bed* of a stream to the interest of navigation . . . ." (emphasis added).

In *Champlain & St. L. R.R. v. Valentine*, 19 Barb. 484, 492 (N.Y. Sup. Ct. 1853), the court held that ownership bounded by Lake Champlain runs to the low water line, but if a building below the high water line "is an obstruction or annoyance to the common passage by the public and to navigation, it may be a public nuisance."

But cf.:

People v. Waite, 103 Misc. 2d 204, 206, 425 N.Y.S.2d 462, 463 (St. Law. County Ct. 1979). On the question of possible trespass by a boater who tied the boat to some brush, the court wrote that there was "insufficient evidence . . . as regards the location of the brush and whether it was growing from the bank of the river or situate within the stream." But the court added dicta suggesting that trespass might be possible "if the boat is tied to the shore or anchored." *Id.* at 207, 425 N.Y.S.2d at 464. No trespass was found on the facts before the court.

Stewart v. Turney, 237 N.Y. 117, 130, 142 N.E. 437, 442 (1923), in which the court demurred. After *assuming* that title on Cayuga Lake extends to the low water mark, the court wrote, "[w]hether in high water the public has not the right of navigation wherever a boat may float we do not decide." The court held that the defendants, who entered the beach area for the purpose of hunting, were trespassers. *Id.* at 131, 142 N.E. at 442.

In its analysis, the court in *Stewart v. Turney*, considered also what "bank" would mean when applied to a river. It quoted with apparent approval from an Iowa case which defined the "high-water mark" of the Mississippi River, noting that a river bank means "the portion of earth which confines the river in its channel . . . . They are impressed upon the earth itself by the attrition of the river current. Certainly what the river does not occupy long enough to wrest from vegetation is not river bed. All this is clearly true." *Id.* at 127, 142 N.E. at 441.

4.4. Recreational Use Under the Public Right of Passage — Although commercial usefulness is frequently given as both a rationale and a criterion for the public right of passage, no case found has ever held that the public's common-law right of use is limited to commercial passage. On the contrary, the cases frequently describe the public's right of use in such generic terms as "travel", "passage", or "transportation". *See supra* § 4.2.1. Similarly, streams navigable in fact are typically referred to as "highways" for public use, undistinguished, except as to mode of transport, from public highways on dry land. *See City of Albany v. State*, 71 Misc. 2d

294, 296-98, 335 N.Y.S.2d 975, 978 (N.Y. Ct. Cl. 1972) (Interstate Highway use is *not* a use "substantially different" from public waterway use).

The notion that the public right is somehow inferentially limited to commercial use is contrary, moreover, to an express basic assumption which underlies the New York rule that allows private ownership of streams in the first place, *viz.* that, irrespective of whether ownership is public or private, the law makes "no distinction against the public right of passage and transportation." *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 412, 94 N.E.199, 202 (1911). Permitting bed-owners to prohibit recreational use would create a major practical difference between public and privately owned waterways — inasmuch as state owned waters are clearly available for recreational use. *See Granger v. City of Canandaigua*, 257 N.Y. 126, 131, 177 N.E. 394, 396 (1931); *Tucci v. Salzhauer*, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721, 723-24 (2d Dept. 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973). This difference would also run counter to the postulate, made from the very first cases, that stream ownership can be private "without any public inconvenience." *Palmer v. Mulligan*, 3 Cai. R. 307, 319-20 (N.Y. Sup. Ct. 1805) because "the rights and interests of the public, *such as* fishing, ferrying and transportation, are preserved . . . ." *Smith v. City of Rochester*, 92 N.Y. 463, 480 (1883) (emphasis added).

There is no neat division between commercial and recreational use. *See e.g., Sawczyk v. United States Coast Guard*, 499 F. Supp. 1034, 1039 (W.D.N.Y. 1980), where the court found the Falls-to-Lewiston reach of the Niagara River to be navigable in fact [and thus subject to United States admiralty jurisdiction] based in part on commercial use in the form of *regularly operated raft trips* (apparently recreational), stating that "the raft venture at issue in these cases evidences the continuing effort to exploit the river commercially."

Several cases provide clear affirmative indications that recreational use is included:

In *People v. Waite*, 103 Misc. 2d 204, 425 N.Y.S.2d 462 (St. Law. County Ct. 1979), a prosecution for trespass, the conviction was reversed on the grounds, merely, that the

stream in question was navigable, notwithstanding that the defendant's presence on the stream was apparently for a recreational purpose (non-commercial fishing).

In *Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 825 (2d Dept. 1960), an action by the bed-owner for trespass, the court stated that the "defendant's right to [use] . . . the basin depends upon whether . . . the creek was navigable . . . ." It also stated that: "The fact that a stream has been used for pleasure boating may be considered on the subject of the stream's capacity and the use of which it is susceptible." *Id.* at 235, 204 N.Y.S.2d at 826. It appears from a companion case that the defendant's purpose was recreational. *See People v. Kraemer*, 7 Misc. 2d 373, 377, 164 N.Y.S.2d 423, 427 (Police Ct. Suff. County 1957), *aff'd*, 6 N.Y.2d 363, 160 N.E.2d 633, 189 N.Y.S.2d 878 (1959).

In *People ex rel. New York Cent. R.R. v. State Tax Comm'n*, 258 A.D. 356, 360. 16 N.Y.S.2d 812, 817 (3d Dept. 1940), *aff'd*, 284 N.Y. 616, 29 N.E.2d 932 (1940), the court, in holding certain waters to be navigable in fact, noted as a relevant factor "that the creek and bay had both been actually navigable commercially *and for pleasure* and that they still retain their capacity for use." (emphasis added).

See Tucci v. Salzhauer, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721, 723-24 (2d Dept. 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973), which held that the *jus publicum* includes "use [of] the water covering the foreshore for boating, bathing, fishing and other lawful purposes; and when the tide is out . . . as a means of access to reach the water for the same purposes and to lounge and recline thereon," the latter being "consistent with and necessary for the complete and innocent enjoyment of [the] right of access to the waters . . ." (emphasis added). (It should be noted, however, that the lands thus subjected to the *jus publicum* were a tidal foreshore still in government ownership. *Cf. United States v. Kane*, 602 F.2d 490, 493 (2d Cir. 1979), observing that the *jus publicum* may be limited by a conveyance of the land into private ownership.)

Cf.:

Trustees of Freeholders and Commonalty of Southamp-

ton v. Heilner, 84 Misc. 2d 318, 328, 375 N.Y.S.2d 761, 770 (N.Y. Sup. Ct. 1975), in which the court cited use by pleasure craft as the primary evidence of navigability in fact, stating, "[I]n today's life it cannot be said that this use is less important to society than commercial uses such as logging or transporting produce across the water."

People v. System Properties, Inc., 2 N.Y.2d 330, 344-45, 141 N.E.2d 429, 435, 160 N.Y.S.2d 859, 867-68 (1957), in which the court referred to the reach of the state's power over Lake George held in trust for the people as being "as great as the uses and possibilities of the lake for navigation, as a waterpower reservoir and not excluding recreational uses."

But cf.:

Brant Lake Shores, Inc. v. Barton, 61 Misc. 2d 902, 907, 307 N.Y.S.2d 1005, 1012 (N.Y. Sup. Ct. 1970), where title was the issue. The court wrote of Brant Lake: "As a public highway, anyone could use it for generally accepted highway purposes over water, such as floating logs and timber, but this does not include the right to boat, bathe and swim." Despite the breadth of this dicta, the court apparently did not intend a statement of the general common law rule (for which no authorities were cited), but rather only an interpretation of the particular statute which it had before it. The statute in question had declared the lake and other waters to be "public highways for the purpose of floating logs, timber and lumber." *Id.* The court also noted that "however a public highway comes into existence, when once established there is no limitation of its use to certain individuals . . . ." *Id.*

Granger v. City of Canandaigua, 257 N.Y. 126, 177 N.E. 394 (1931), involved a dispute over lake bed title. The court said that to hold that the state "had dedicated the bed of [Canandaigua Lake] to private uses, subject to the rights of navigation only, would be not only to deprive the public of access to the water for *recreation and enjoyment* but also to deprive the riparian owners of their customary privileges." *Id.* at 131, 177 N.E. at 396 (emphasis added). While this obiter dictum suggests that "navigation" might be something different from "recreation and enjoyment", recreational *boating* was not the topic of discussion at all. Rather, it was solely

non-boating recreational use of the disputed lands, "filling them for park purposes," that was at issue in the case. *Id.* at 128, 177 N.E. at 395. The quoted language is, therefore, at most a very weak and ambiguous authority for the proposition that recreational boating does not count as "navigation".

Smith v. Rochester, 92 N.Y. 463, 483 (1883), in which the court said that "the sovereign right grew out of and was based upon the public benefits in promoting trade and commerce, supposed to be derived from keeping open navigable bodies of water *as public highways* for the common use of the people." (emphasis added). Although it added that the public navigation easements would be "limited to the very purpose for which they were created," it made no suggestion that the easement was therefore limited to commercial travel as opposed to non-commercial travel. *Id.* at 484. More likely, the court meant only to support its holding in the case, *viz.* the state cannot, under guise of the navigation easement, divert the waters from the navigable waterbody altogether, an action that is manifestly "inconsistent" with navigation for *any* purpose whatsoever. *Id.* at 484.

4.5. Uses Incidental to Passage on Streams — Passage along a small stream frequently entails touching the bottom, sometimes requires touching or even going upon the banks, and may involve other activities, such as fishing. Apart from a few cases that approve anchoring, no New York cases have been found which explicitly deal with the legality of touching the bottom or shores, poling, lining, portaging or scouting in connection with lawful passage. Yet, from time immemorial, these shore and bottom uses have presumably been unavoidable physical necessities for travel along smaller navigable rivers and streams. Apparently, no one has ever seen fit to challenge whether the public right of passage includes a right to make reasonable use of the bed and banks of a stream for purposes that are necessary incidents of passage itself.

The right to make at least some minimal bottom and shore use in passage follows from the ordinary common law of easements. As the cases frequently state, the public right of passage is an easement. *See supra* § 4.2.1. It is an easement of way which came into existence by *implied reservation* when

the state (or king) originally conveyed the servient riparian lands to their first private owners. Under the common law of easements, whenever "a right of way is reserved or granted, but not specifically defined, the rule is 'that the way need only be such as is *reasonably necessary and convenient* for the purpose for which it was created.' " *Dalton v. Levy*, 258 N.Y. 161, 167, 179 N.E. 371, 372 (1932) (emphasis added). "Whatever is essential to the enjoyment of a thing granted must be taken by implication." *Langdon v. City of New York*, 93 N.Y. 129, 147 (1883).

The reason for this rule is common-sensical: "Without it the grant itself would be an absurdity and nullity." *Id.* at 146. Quoting Coke on Littleton, the Court of Appeals added: "He who grants a thing, grants impliedly all that is necessary to the enjoyment of that thing, *and this principle extends to grants made by the law.*" *Id.* at 151 (emphasis added). While the public right of passage is an unusual easement in that it is held by the state in a sovereign capacity and in trust for the people, these are hardly reasons to cut it down.

See also Tucci v. Salzhauer, 40 A.D.2d 712, 713, 336 N.Y.S.2d 721, 723-24 (2d Dept. 1972), *aff'd*, 33 N.Y.2d 854, 307 N.E.2d 256, 352 N.Y.S.2d 198 (1973) ("The right of access comprehends, 'necessarily and justly, whatever is needed for the complete and innocent enjoyment of that right.' " (quoting *Trustees, Town of Brookhaven v. Smith*, 188 N.Y. 74, 87, 80 N.E. 665, 670 (1907)).

4.5.1. Touching the Bottom — Several cases recognize a public right to touch the bottom (or shore within the high water lines) in connection with the public right of passage. Two dicta indicate limitations, *viz.* that the touching must be within the banks of the stream and must be in connection with navigational use.

4.5.1.1. Recognizing the Right — In *Fairchild v. Kraemer*, 11 A.D.2d 232, 235, 204 N.Y.S.2d 823, 825-26 (2d Dept. 1960), the court wrote of the right to "navigate and anchor" a boat as depending upon whether the waterbody was "navigable in fact", without in any way distinguishing between the two, even though anchoring would have probably required the defendant to touch the bottom.

In *People v. Kraemer*, 164 N.Y.S.2d 423, 433 (Police Ct. Suff. County 1957), *aff'd*, 6 N.Y.2d 363, 160 N.E. 633, 189 N.Y.S.2d 878 (1959) the court upheld a boater's right to anchor on privately owned submerged lands, quoting with approval from *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 87 (1913), as follows: "[T]he public right of navigation . . . must include the right to use the bed of the water for every purpose which is in aid of navigation."

In *Appleby v. City of New York*, 271 U.S. 364, 397 (1926), the Court indicated that privately owned lands under navigable waters (the Hudson River off Manhattan) were subject, until filled, to navigation and "incident to such use, occasional mooring may . . . take place." This statement clearly appears to recognize that touching the bottom or shoreline are legitimate when incidental to lawful navigation over private underwater lands.

It should be noted, analogously, that the foreshore of tidal waters is subject to "touching" in connection with the public right of passage — on foot when the tide is out — even if the lands in question are held in private ownership. *Barnes v. Midland R.R. Terminal Co.*, 193 N.Y. 378, 386 (1908), *modified in part*, 218 N.Y. 91 (1916) (upholding right of public to pass under and over a pier on private lands between the high and low water lines).

See also People v. Johnson, 7 Misc. 2d 385, 387, 166 N.Y.S.2d 732, 734 (Police Ct. Suff. County 1957) ("anchoring in the lands was [described] as an incident to the exercise of the public's dominant right of navigation.").

4.5.1.2. Appearing to Limit the Right — In *People v. Waite*, 103 Misc. 2d 204, 206, 425 N.Y.S.2d 462, 463 (St. Law. County Ct. 1979), a prosecution for trespass, the defendant had tied a line from his boat to some brush along the shore, but the court overturned the conviction without regard to the question of whether such conduct, in itself, constituted a trespass, noting: "[T]here was insufficient evidence . . . as regards the location of the brush and whether it was growing from the bank of the river or situate within the stream." The court indicated, however, that "a trespass infraction *may* be found if the boat is tied to the shore or anchored." *Id.* at 207,

425 N.Y.S.2d at 464. (emphasis added).

In *Stewart v. Turney*, 237 N.Y. 117, 130, 142 N.E. 437, 442 (1923), the Court of Appeals held that certain unnamed activities on a privately owned lakeshore, *i.e.*, above the *low* water mark of Cayuga Lake, constituted trespass. From the Appellate Division report, the activities at issue seem to have been limited to hunting. *See Stewart v. Turney*, 203 A.D. 486, 197 N.Y.S. 81 (4th Dept. 1922). There was no indication that the activities in question were in any way related to navigation, and hunting *per se* is not an activity traditionally said to be encompassed within the New York public right of passage on fresh waters.

4.5.2. Carrying or Portaging Around Obstacles — Because the public right of passage is an easement, *see supra* §§ 4.2.1. and 4.5, the width of the right of way should be whatever is "necessary for the use for which it was created." *Town of Ulster v. Massa*, 144 A.D.2d 726, 728, 535 N.Y.S.2d 460, 461 (3d Dept. 1988). *See also Dalton v. Levy*, 258 N.Y. 161, 167 (1932); *Langdon v. Mayor*, 93 N.Y. 129, 145-47 (1883) ("Whatever is essential to the enjoyment of the thing granted must be taken by implication.").

Numerous cases uphold the principle that a stream may be navigable in fact and, thus, subject to the public right of passage, even though the stream has places where there are rifts, shallows or other obstacles. *See supra* § 2.3.4 None of these cases states what boaters are expected (or permitted) to do when they encounter such obstacles to navigation. Yet the public right of passage would have little practical significance on these streams if it did not include the incidental right to survey and make necessary detours around the obstacles. The application of the ordinary common law of easements to these situations seems too obvious to have been litigated.

Above the banks there is "no highway along the margin of our navigable rivers and lakes." *Ledyard v. Ten Eyck*, 36 Barb. 102, 127 (N.Y. Sup. Ct. 1862) (Cazenovia Lake). No case, however, has ever questioned the public's right to make the minimal shore uses which, due to topography, are inseparable incidents of passage itself, *e.g.*, portaging, lining and scouting rapids.

In *People v. Kraemer*, 164 N.Y.S.2d 423, 433 (Police Ct. Suff. County 1957), the court recognized a right to go ashore when necessary in connection with navigation even though it found the particular defendant guilty of trespass in going upon the foreshore of navigable tidal waters, stating: "[T]he public right of navigation does not include the right to enter upon the foreshore when it is in private ownership, *except when and to the extent necessary in the exercise of the right of navigation.* The defendant . . . does not contend that an emergency arose . . . that required him to go ashore." (emphasis added).

Further support for a right to go ashore when necessary in connection with navigation is to be found in the larger context of common law. The right of members of the public to deviate from blocked public ways and go onto privately owned land is long established. *See* 1 HARPER, JAMES AND GRAY, TORTS 49 (2d ed. 1986); PROSSER AND KEETON, TORTS 145-148 (5th ed. 1984). The principle was recognized in New York over a century ago, and it has never been denied: "A person travelling on a public highway, and finding a place foundrious and impassible, has doubtless a right to remove enough of the fences in the adjoining close to enable him to pass around the obstruction." *Williams v. Safford*, 7 Barb. 309, 314 (N.Y. Sup. Ct. 1849). This principle is, moreover, a part of the general American common law, as evidenced by the following in the RESTATEMENT (SECOND) OF TORTS, § 195 (1965):

> A traveler on a public highway who reasonably believes that such highway is impassable, is privileged, when he reasonably believes it to be necessary in order to continue his journey, to enter, to a reasonable extent and in a reasonable manner, upon neighboring land in the possession of another . . . .

See also citations dating from the year 1679 and after in the RESTATEMENT (SECOND) OF TORTS § 195 (1965).

Even more directly on point, the Restatement describes the right to navigate upon navigable waters as including "the ancillary privilege to enter on riparian land to the extent that

this is necessary for the accomplishment of the (purpose of the) principal privilege." RESTATEMENT (SECOND) OF TORTS § 193, Comment d (1965). This privilege is really only a particular application of the general common law rule already noted above for defining the extent of rights of way which are not specifically defined, *viz.* the way will be such as is "*reasonably necessary and convenient* for the purpose for which it was created." *Dalton v. Levy*, 258 N.Y. 161, 167 (1932). *See supra* § 4.5.

In summary, despite the paucity of direct judicial confirmation, all of the pointers in the case law indicate that the public right of passage includes a right to use riparian lands insofar as is reasonably necessary to accomplish safe passage itself. It is not the policy of the common law to withhold that which would be "essential to the enjoyment of a thing granted" and without which "the grant itself would be an absurdity and nullity." *Langdon v. Mayor*, 93 N.Y. 129, 145-46 (1883). An implicit right to make some minimal shore use is essential in order for the many cases which define rivers with obstacles as "navigable in fact" to make any sense.

4.5.3. Fishing — According to Lord Hale, the English law gave riparian owners on freshwater streams "the propriety of the soil, and consequently, the right of fishing *usque ad filum aquae* . . . ." (emphasis added). *See* Hargrave's Hale, *De Jure Maris* at ch. 1, quoted in *People v. Platt*, 17 Johns. Rep. 195, 209 (N.Y. Sup. Ct. 1819). In the first New York case involving a *navigable* freshwater stream, the court followed the English precedent and held that the exclusive right of fishery belongs to the owner of the streambed. *Hooker v. Cummings*, 20 Johns. 90, 100-01 (N.Y. Sup. Ct. 1822). More recent cases, however, have recognized that freshwater streams subject to the public right of passage are also subject to a public right to fish, at least from a boat.

As also noted earlier, the Court of Appeals has, at one point, strongly suggested that Lord Hale misconceived the English law of fresh water ownership entirely, *See supra* § 3. Ownership of Streambeds. While the Court of Appeals eventually reconfirmed New York's general adherence to the Hale version of things, putting the beds of fresh water in private

ownership, *it did so on the assumption that the public rights of* "fishing, ferrying and transportation" were preserved. *See infra* discussion of *Hooker v. Cummings.*

In *People v. Waite*, 103 Misc. 2d 204, 425 N.Y.S.2d 462 (St. Law. County Ct. 1979), a prosecution for trespass, the defendant was accused of fishing in a posted stream (the St. Regis River) from a boat. The *locus in quo* was within an area that had been leased for exclusive fishing and hunting to a private club. The court wrote:

> [A]s the West Bank of the St. Regis River is by the trial evidence shown to afford a channel for useful commerce of a substantial and permanent character, and the stream is not privately owned, neither . . . [riparian]. . . can be found to own the water flowing in front of the premises. A person boating on the waters is, therefore, not a trespasser, even if he utilizes the stream for fishing . . . .

Id. at 207, 425 N.Y.S.2d at 464.

In *People v. Johnson*, 7 Misc. 2d 385, 388, 166 N.Y.S.2d 732, 735 (Police Ct. Suff. County 1957), the court wrote: "At common law, the public ordinarily had the right to hunt and fish in waters subject to the public right of navigation." The court cited *Knickerbocker Ice Co. v. Shultz*, 116 N.Y. 382, 387 (1889) which stated that: "The right to navigate the public waters and to fish therein are public rights belonging to the People at large." The court also cited *Slingerland v. International Contr. Co.*, 169 N.Y. 60, 72 (1901), which held that "[f]ishing in navigable rivers, . . . is presumptively common to the public . . . ." Insofar as these cases expressed views concerning non-tidal waters, it should be noted that all three provide only dictum. They are, however, consistent with the apparent intent of the Court of Appeals to preserve public fishing when, in *Smith v. City of Rochester*, 92 N.Y. 463, 481 (1883) it confined the "navigable in fact" criterion of state ownership (American rule) to the Hudson and the Mohawk Rivers. *See infra.*

In *Smith v. City of Rochester*, 92 N.Y. 463, 480 (1883), the court recognized a public right of fishing as the co-equal

of transportation, asserting: "[T]he rights and interests of the public, such as *fishing*, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign . . . ."

In *Gould v. James*, 6 Cow. 369, 376 (N.Y. Sup. Ct. 1826), there was dictum quoting the English private-fishery rule as the law "of this state".

In *Ex parte Jennings*, 6 Cow. 518, 527 (N.Y. Sup. Ct. 1826), the rule was recognized, in dictum, that "the owners of land on the margin, above tide water, have been allowed the several and exclusive right of fishery."

In *Hooker v. Cummings*, 20 Johns. 90, 100-01 (N.Y. Sup. Ct. 1822), it was held to be a trespass to fish in the Salmon River (near Lake Ontario) even though the stream was navigable in fact. The court stated that it was following the English rule that, above the ebb and flow of the tides, "the adjoining owners have the exclusive right" — including the exclusive right of fishery. [This case was severely criticized in *People ex rel. Loomis v. Canal Appraisers*, 33 N.Y. 461, 474-77 (1865), the case which adopted the American majority rule — albeit temporarily — as the law of New York (*i.e.*, navigability in fact is navigability in law)]. *See supra* Chapter III. Although the *Loomis* adoption of the American majority rule for defining "navigable" was later repudiated by *Smith v. City of Rochester*, quoted above, the part of *Loomis* that concedes a public right of fishing on all streams navigable in fact (*see* above quote) apparently survived.

Cf.:

Hill v. Bishop, 63 Hun. 624, 17 N.Y.S. 297, 298 (5th Dept. 1892) (dictum appearing to recognize the English rule that the exclusive right of fishery is owned by the bed owner of a pond).

People v. Platt, 17 Johns. 195, 216 (N.Y. Sup. Ct. 1819): "[T]he river *Saranac* is not capable of being used as a passageway for boats, or water craft of any kind . . . The fishery itself has passed under the grants . . . ."

4.5.4. Limitations on the Public Right of Passage — The courts in New York have seldom had occasion to address what limitation might apply to the public's right of

passage.

In *Smith v. Odell*, 234 N.Y. 267, 271-72, 137 N.E. 325, 326 (1922), the court upheld exclusive hunting leases for Great South Bay made by the Town of Brookhaven. The court found that the town is the owner of the bed of the bay under colonial patents which expressly gave Brookhaven the exclusive rights of "fishing, hawking, hunting and fowling." In the view of the Appellate Division, the right of passage incidentally included a right to take wild fowl. *Smith v. Odell*, 194 A.D. 763, 766, 185 N.Y.S. 647, 649 (2d Dept. 1921). The Court of Appeals disagreed, in this particular case, because of the colonial patent. The latter court stated: "The public right, whatever it might otherwise be, must be held limited in such a situation to the right to use the waters for the purposes of a public highway." *Smith v. Odell*, 234 N.Y. at 272, 137 N.E. at 327. The court added that "the easement of passage over navigable water does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator." *Id.*

In *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (Sup. Ct. 1921) (Susquehanna River), the court observed, as dictum: "The easement . . . gives to the public the right to use the stream for the purposes of navigation only."

In *Ex Parte Jennings*, 6 Cow. 518, 527, 528 (N.Y. Sup. Ct. 1826), it was said: "The public right is one of passage, and nothing more; as in a common highway. It is called by the cases an *easement*; and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement." *Quoted in Smith v. Rochester*, 92 N.Y. 463, 485 (1883) (emphasis added).

4.6. Conveyances of Underwater Land Free of Public Navigation Rights — The settled rule is that the state legislature has, within certain limits, the power to convey land under navigable waters without preserving the public right of passage. The limitations on this legislative power to abridge or extinguish the public right are, speaking generally, requirements of public interest, but the limitations have not been defined by the courts with any specificity.

For the most part, in cases where extinguishment of the *jus publicum* has been judicially approved, the underwater areas affected were typically at the water margins and relatively small compared with the waterway as a whole. The New York courts have consistently struck down wholesale divestitures to private interests of massive areas under water, and they have never allowed the public right of passage to be extinguished to such an extent as to render whole stretches of navigable water non-navigable.

It should be noted that most of the cases which consider these questions involve express grants of lands under *tidal* waters. The cases make no suggestion, however, that the state has any less power to grant lands free of the public's navigation rights in fresh waters — nor that its power in respect to fresh waters is subject to less stringent limitations. The following differences should, however, be noted:

1. In the case of *tidal waters*, a "special effort" must be made for the state to convey any title whatsoever to underwater lands. Without an explicit intention to the contrary, grants of shorelands held by the sovereign are presumed *not* to include any interest in lands below the high water line. *See Tiffany v. Town of Oyster Bay*, 209 N.Y. 1, 9, 102 N.E. 585, 587 (1913); *Sage v. Mayor*, 154 N.Y. 61, 69-70, 47 N.E. 1096, 1097-98 (1897). On the other hand, if it is found that the state *did* make a valid unconditional grant of lands under tidal waters — especially if for a consideration — the applicable rule permits the public's right of passage to be impaired by the grant "so as to make [the grant] effectual for some purpose." *Langdon v. New York*, 93 N.Y. 129, 144 (1883). *See also People v. Steeplechase Park Co.*, 218 N.Y. 459, 469, 113 N.E. 521, 523 (1916) ("If it had been [the] intention to reserve to the public a right of passage over the lands included in the grant, they would have provided therefor . . . .").

2. In the case of *fresh waters*, no "special effort" need be made for the state to convey private title to underwater lands. On the contrary, any grant of lands adjacent to a non-tidal stream is *presumed* to carry title to the center of the stream, subject to the public's right of passage. *See*

supra §§ 3.2 and 3.4. While the ownership of lands under fresh waters thus passes easily — indeed, by implication —from the sovereign to private hands, there has never been the corresponding tendency to presume that the private titles in fresh waters are intended to be free of the public's right of passage. *See Shaw v. Crawford*, 10 Johns. 236, 238 (N.Y. Sup. Ct. 1813) ("Individuals who occupy the adjoining banks may use the waters for their own emolument, so far only as it can be done without any material interruption of the public use.").

4.6.1. State Has Power to Convey Free of Public Navigation Rights — Many cases, including virtually all of the more recent cases, hold, or at least recognize, that the state has the power to convey underwater lands free of public navigation rights.

In *United States v. Kane*, 602 F.2d 490, 493 (2d Cir. 1979), the court recognized the possibility that a private owner *might* have a right to fence off the foreshore (on tidal waters), stating that "it is not at all clear that free access along the foreshore has been held to be a public right in New York when the state . . . has conveyed the right to a portion of the foreshore to a private party." Because of such possibility, the court reversed a grant of summary judgment to remove the fences.

In *Riviera Ass'n, Inc. v. North Hempstead*, 52 Misc. 2d 575, 582, 276 N.Y.S.2d 249, 256-57 (N.Y. Sup. Ct. 1967), the court summarized the cases as follows: "[W]hile conveyance of lands under water for a public purpose is permissible because it accords with the public trust, purpose is not the determinative factor [citations omitted]. Rather the validity of the conveyance turns on the degree to which the public interest will be impaired . . . ." At another point it noted that: "Such limitation upon alienation of land under water as there is exists to protect the public right of navigation and other lawful uses of the water." [Citations omitted] *Id.* at 579, 276 N.Y.S.2d at 253. (Upheld a conveyance by town of filled tidal lands where navigation was "in no way adversely affected by the fill . . . ." *Id.* at 579, 276 N.Y.S.2d at 254).

In *People v. New York & Ontario Power Co.*, 219 A.D.

114, 115-117, 219 N.Y.S. 497, 500 (3d Dept. 1927), the court wrote that the legislature may "grant unconditional rights in shore waters or in streams, [citations omitted] if such right . . . will not unreasonably interfere with the general use and control of the public waters." (citations omitted).

In *Appleby v. City of New York*, 271 U.S. 364, 383-84 (1926), the United States Supreme Court considered the effect of a conveyance of certain underwater lands on the west side of Manhattan. The Court concluded, after an extensive review, that:

> [W]henever the legislature deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters *and exclude itself from its exercise as sovereign of the jus publicum*, that is the power to preserve and regulate navigation, it might do so; *but that conclusion that it had excluded the jus publicum could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted.*
> *Id.* (emphasis added).

The court affirmed that the state may "by an absolute deed of land under water, with the right of the grantee to fill it, part with its own power to regulate the navigation of water over this land which would interfere with its ownership and enjoyment by the grantee." *Id.* at 388-89.

In its opinion in *Appleby*, the New York Court of Appeals had declared: "It scarcely needs assertion that [the government] could not destroy the navigability of the Hudson by making exclusive private grants." *Appleby v. City of New York*, 235 N.Y. 351, 361, 139 N.E. 474, 475 (1923). The Court of Appeals had upheld the city's right to dredge Appleby's land on the grounds that Appleby's ownership was, *in any event*, subject to the federal navigation easement. The United States Supreme Court held that the federal navigation easement did not, however, somehow preserve that the rights of the city once it had conveyed the *jus publicum* to Appleby's predecessor. 271 U.S. at 399-402. *Accord Waterford Elec. Light, Heat & Power Co. v. State*, 208 A.D. 273, 287, 203 N.Y.S. 858, 871 (3d Dept. 1924), *aff'd*, 239 N.Y. 629, 147 N.E.

225 (1925) (The "State [sic], as between itself and the claimant, cannot be heard to raise the bar of the Federal act to avoid payment of compensation . . . .").

In *James Frazee Milling Co. v. State*, 122 Misc. 545, 549, 204 N.Y.S. 645, 649 (N.Y. Ct. Cl. 1924) (Seneca River), the court wrote:

> It is well established in this country that the Legislature of the state may, as the representative of the people, grant the soil or confer an exclusive privilege in navigable rivers or waters held by it for the people, *or authorize a use inconsistent with the public right, or interfere with the right of navigation*, (emphasis added) so far as the public is concerned, *when acting in the public interest.*" (emphasis in original).

In *First Construction Co. v. New York*, 221 N.Y. 295, 316, 116 N.E. 1020, 1026 (1917) (Gowanus Bay), an action for just compensation for an alleged taking of lands under tidal waters the court wrote: "[A]n act granting the right to fill in lands under water, and thereby acquire title to the same, gives an inchoate, vested interest in the lands described which is a property right . . . ."

In *People v. Steeplechase Park Co.*, 218 N.Y. 459, 113 N.E. 521 (1916), the court upheld the right of a private owner of Atlantic Ocean foreshore lands to obstruct the public's right of passage, observing that the owner had received "an unrestricted fee", *Id.* at 469, 113 N.E. at 523, and that since 1786, "thousands of grants have been made, some with, and some without restrictions, some absolute, and some conditional. Upon the faith of the title of lands so conveyed in fee there are now docks, wharves, and buildings . . . lands filled in, built upon and beneficially enjoyed worth millions of dollars." *Id.* at 471, 113 N.E. at 524. "If it had been [the government officers'] intention to reserve to the public a right of passage over the lands included in the grant, they would have provided therefor . . . ." *Id.* at 469, 113 N.E. at 523. "[A] grant for 'beneficial enjoyment' to a grantee, his heirs and assigns, imports a fee . . . ." *Id.* at 472, 113 N.E. 524.

In *People v. D. & H. Co.*, 213 N.Y. 194, 199, 107 N.E. 506,

507 (1914), the court wrote: "The state, except for [federal constitutional] limitations, has power to grant the title to lands under water, unconditionally or conditionally, or it may grant special rights therein, *or it may restrict the boundaries of navigable waters by defining the same.*" (emphasis added).

In *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 8, 105 N.E. 849 (1914), the court wrote: "The power of the legislature to grant land under navigable waters to private persons or corporations for beneficial enjoyment has been exercised too long and has been affirmed by this court too often to be open to serious question . . . ." *Id.* at 8, 105 N.E. at 851. The court nevertheless held the attempted grant invalid noting that "[i]t virtually turns over to the corporation *entire control* of navigation at the Long Sault Rapids." on the St. Lawrence River. *Id.* at 9, 105 N.E. at 852 (emphasis added).

In *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 78 (1877), the court stated that "the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tidewaters, or *authorize a use inconsistent with the public right* . . . ." (emphasis added).

In *Lansing v. Smith*, 4 Wend. 9, 20-21 (N.Y. 1829), the chancellor observed the following distinction:

> [t]he king as *parens patriae* owned the soil under all the waters of all navigable [*i.e.*, tidal] rivers . . . for the benefit of his subjects at large; who were entitled to the free use of the sea, and all tide water, for the purposes of navigation, fishing, &c., . . . The king can not *now* deprive his subjects of their rights, by granting the public navigable waters to individuals. *But there can be no doubt of the right of parliament in England, or the legislature of this state, to make such grants,* to make such grants, when they do not interfere with the vested rights of particular individuals.

(emphasis added). Quoted with approval in *Gould v. Hudson River R.R.*, 6 N.Y. 522, 539 (1852).

Other cases recognizing the state's power to grants rights which may impair or destroy public right of passage follow:

"The policy of the State, since an early time in the his-

tory of our State, has been directed toward encouraging the private development of waterfronts, subject only to the condition that the use be reasonable and not obstructive of navigation [Citation omitted]." *Town of Hempstead v. Oceanside Yacht Harbor Inc.*, 38 A.D.2d 263, 266, 328 N.Y.S.2d 894, 898 (2d Dept. 1972), *aff'd*, 32 N.Y.2d 859, 299 N.E.2d 895, 346 N.Y.S.2d 529 (1973).

People v. New York & Ontario Power Co., 219 A.D. 114, 116, 219 N.Y.S. 497, 501 (3d Dept. 1927): The legislature may "for the advantage of the public . . . grant unconditional rights in shore waters or in streams [Citation omitted] if such right . . . will not unreasonably interfere with the general use and control of the pubic waters."

Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 386 (1908), *modified in part*, 218 N.Y. 91 (1916) (Pier between high and low water lines on tidal waters could obstruct public passage only to the extent necessary to permit reasonable use of the upland.).

Ledyard v. Ten Eyck, 36 Barb. 102, 126 (N.Y. Sup. Ct. 1862) (Cazenovia Lake: When "[t]he defendant entered into possession [by lawfully filling] the shallow water in front of and next to his property . . . the trusteeship of the state . . . was virtually at an end.").

See also:

Bay Ridge Dock Co. Inc. v. United Dry Docks Inc., 146 Misc. 404, 262 N.Y.S. 212 (N.Y. Sup. Ct. 1932), *aff'd*, 237 A.D. 900, 261 N.Y.S. 1002 (2d Dept. 1933).

In *Saunders v. New York Central and Hudson River R.R.*, 144 N.Y. 75, 86, 38 N.E. 992, 994 (1894), the court stated: "While the state holds title to lands under navigable waters in a certain sense as a trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for public, or such other purposes as it may determine to be for the best interests of the state . . . ."

Other Cases:

In *Riviera Ass'n, Inc. v. N. Hempstead*, 52 Misc. 2d 575, 579, 276 N.Y.S.2d 249, 253 (N.Y. Sup. Ct. 1967), the court indicated that lawfully filled underwater land loses its character as "navigable"; *but cf. Romart Properties, Inc. v. City of New*

Rochelle, 67 Misc. 2d 162, 171, 324 N.Y.S.2d 277, 286 (N.Y. Sup. Ct. 1971), *aff'd*, 40 A.D.2d 987, 338 N.Y.S.2d 247 (2d Dept. 1972) (one who fills does not acquire riparian rights of "upland owner").

In *In re City of New York*, 295 N.Y. 415, 429, 68 N.E.2d 422, 427-28 (1946), the court wrote: "[T]he rule that 'land originally under water is treated as land under water even after it is filled' is not an inflexible one . . . [L]and under water may lose its 'character of foreshore' at least for some purposes . . . where the filling is pursuant to permission or grant."

In *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 20, 136 N.E. 224, 225 (1922), the court wrote: "When the sovereign grants to the owner of the adjacent upland the title to lands under navigable waters, such owner may . . . fill in such lands, make upland out of them, and extinguish the *jus publicum.* (citations omitted) (emphasis in original).

Roe v. Strong, 107 N.Y. 350, 358, 14 N.E. 294, 296 (1887) ("The title to the soil under navigable waters vested in the Long Island towns under the colonial patents was, undoubtedly, subject to the public right of navigation, and it would seem to follow that the towns could not alienate the title so acquired *to the material prejudice of the common right.*" (emphasis added)).

Williams v. Mayor of New York, 105 N.Y. 419, 428, 11 N.E. 829, 830 (1887) ("This right was tantamount to an ownership. It embraced the entire beneficial interest, and was inconsistent with any title remaining in the State. . . . All use for the floating of vessels disappeared, so far as it [the wharf] occupied the water.").

Mayor of New York v. Law, 125 N.Y. 380, 26 N.E. 471 (1891).

4.6.2. State Has *No* Power to Convey Free of Navigation Easement — A few cases contain dicta to the apparent effect that the state does not have the power to convey underwater lands free of public navigation rights.

"[A]nyone who secured a grant or patent from the State Government of lands under waters took the same subject to the right of navigation, travel along the foreshore, fishing and bathing . . . [This] has been sometimes referred to as the "jus

publicum". *Town of Smithtown v. Poveromo*, 71 Misc. 2d 524, 531, 336 N.Y.S.2d 764, 773-74 (N.Y. Sup. Ct. 1972), *rev'd on other grounds*, 79 Misc. 2d 42, 359 N.Y.S.2d 848 (1973) (Nissequogue River).

In *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 775, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (Susquehanna River), the court observed, as dictum: "The easement pertains to the sovereignty of the state [and] is inalienable . . . ."

In *Smith v. Rochester*, 92 N.Y. 463, 477 (1883), the court wrote: "Among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water. This right is known as the *jus publici* and is deemed to be inalienable." (emphasis added). The court may, however, have been confusing the state's general legislative power (police power), which is, of course, inalienable with the public navigation easement, sometimes known as the "*jus publicum*" .

Miller v. City of New York, 15 N.Y.2d 34, 35, 203 N.E.2d 478, 480, 255 N.Y.S.2d 78 (1964) (property impressed with a trust for the public cannot be alienated without express legislative sanction). *See also Brooklyn Park Comm'n v. Armstrong*, 45 N.Y. 234 (1871).

4.6.3. Effect of Conveyance Free of Public Navigation Right — In *Appleby v. City of New York*, 271 U.S. 364, 397 (1926), in holding that a conveyance, with right to fill, of underwater lands would convey the *jus publicum*, the Court observed:

> Of course we do not intend to say that, under such deeds as these, as long as water connected with the river remains over the land conveyed and to be filled, navigation may not go on and boats may not ply over it, and that incident to such use occasional mooring may not take place.

Nevertheless, "[a]s the city has parted with the jus pub-

licum in respect to these lots, it . . . must be content with sailing over it with boats as it finds it." *Id.* at 400.

Once the *jus publicum* has been conveyed, "the city [or state] can be revested with [that] only by a condemnation of the rights granted." *Id.* at 399. Any effort to regulate or improve navigation in the meantime, as by dredging the underwater lots conveyed, "is a trespass upon the plaintiff's [private owner's] rights." *Id.* at 400. In summary, while the public may still ply the waters over lands conveyed for use inconsistent with navigation, so long as they are wet, eminent domain would be required to re-establish the state's power to promote and preserve public *right* to navigate.

In *First Construction Co. v. New York*, 221 N.Y. 295, 316, 116 N.E. 1020, 1026 (1917) (Gowanus Bay), an action for just compensation for an alleged taking of lands under tidal waters, the court wrote: "an act granting the right to fill in lands under water, and thereby acquire title to the same, gives and inchoate, vested interest in the lands described which is a property right and . . . the grantee cannot be deprived without compensation."

See also: *Bay Ridge Dock Co. v. United Dry Docks*, 146 Misc. 404, 262 N.Y.S. 212 (N.Y. Sup. Ct. 1932), *aff'd*, 237 A.D. 900, 261 N.Y.S. 1002 (2d Dept. 1933).

4.6.4. Limitations on the State's Power to Convey Free of Public Navigation Right — While many New York cases approve an extinguishment of the public right of passage, in none of these cases did the state attempt to convey the entire channel or navigational right-of-way so as to totally close a navigable waterway for its entire breadth over a substantial length. The case of *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452 (1892), is the landmark "public trust" case standing for the proposition that such an extravagant conveyance of the public right would be invalid. In considering a purported conveyance by Illinois of 1000 acres under Lake Michigan — the entire Chicago harbor plus some — the United States Supreme Court said:

> It is grants of parcels under navigable waters . . . for structures . . . in aid of commerce, and grants of parcels

> which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the [public] trust. . . . *It is only by observing the distinction between a grant of such parcels for the improvement of the public interest or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.*

Id. at 453 (emphasis added).

Although the quoted portion of the *Illinois Central* case is, strictly speaking, a statement of Illinois law, it was cited with approval and followed in *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 10 (1914), and *Coxe v. State*, 144 N.Y. 396, 39 N.E. 400 (1895).

In *Coxe v. State*, 144 N.Y. 396, 405 (1895), the Court of Appeals acknowledged "the power of the sovereign to alienate lands under tide waters," but it noted that:

> the courts have never yet attempted to fix the precise limits of the legislative power . . . . It is very difficult and perhaps wholly impracticable to do so. It would, no doubt, be difficult to reconcile all the numerous expressions of opinion to be found in the decisions on this question. In many of them general language is used which would seem to sanction the doctrine of absolute ownership and the unrestrained power of disposition by the sovereign, but . . . [when] read and understood with reference to the special facts of each case, . . . much of the apparent conflict disappears.

Id. at 406.

The court in *Coxe* concluded with the following general principles: "The title which the state holds [in lands under navigable waters] . . . cannot be surrendered, alienated or delegated, *except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit.*" *Id.* at 406. (emphasis added). As examples, it listed: (a) a grant to

a municipality, (b) grants to railroads, (c) grants to persons engaged in commerce or navigation, and (d) grants to adjoining upland owners for beneficial enjoyment or commercial purposes, *but not* (e) grants "for mere speculative purposes". *Id.* at 407.

4.6.4.1. Limitation: No Substantial Interference with Navigation — In *Moyer v. State*, 56 Misc. 2d 549, 551, 289 N.Y.S.2d 114, 116 (N.Y. Ct. Cl. 1968), the court upheld the right of a riparian owner to build out into a bay of Lake Ontario, but stated as a limitation: "[A]ny use made of the riparian rights must be such that it does not interfere with navigation . . . ."

In *New York Power & Light Corp. v. State*, 230 A.D. 338, 343, 245 N.Y.S. 44, 50 (3d Dept. 1930), the court wrote:

> The state may unconditionally convey a valid title in the beds and waters of a navigable stream when the conveyance is made for a valuable consideration, in aid of the development of public waters for navigation and commerce or in the interests of the public, . . . *but only when it does not unduly interfere with the development of the stream for navigation and commerce.* (emphasis added).

In *People v. New York & Ontario Power Co.*, 219 A.D. 114, 116, 219 N.Y.S. 497, 501 (3d Dept. 1927), the court wrote that the legislature may "grant unconditional rights in shore waters or in streams if such right[s]. . . will not unreasonably interfere with the general use and control of the public waters."

In *Finch, Pruyn & Co. v. State*, 122 Misc. 404, 410, 203 N.Y.S. 165, 170 (N.Y. Ct. Cl. 1924), reviewing the claim of a prescriptive easement to maintain a dam on the Hudson River at Glens Falls (deemed "navigable in fact"), the court wrote: "There can be no doubt it would have been entirely competent for the Legislature at any time to have granted the claimant the right to maintain its dam where now located, *saving to the public its navigable rights in the stream.*" (emphasis added).

In *Appleby v. City of New York*, 235 N.Y. 351, 362, 139

N.E. 474, 476 (1923), *rev'd on other grounds*, 271 U.S. 364 (1926), the Court of Appeals said: "But no case holds that any substantial interference with navigation may thus be authorized [by grants of submerged lands with the right to fill]."

In *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 8-9, 105 N.E. 849, 852 (1914), the court invalidated an attempt by the legislature to transfer away "control of navigation" at the Long Sault rapids of the St. Lawrence River, saying that, for such a conveyance to be valid, "[t]he contemplated use . . . *must be reasonable and one which can fairly be said to be for public benefit or not injurious to the public.*" *Id.* at 10 (emphasis added). The court added that the legislature cannot authorize a conveyance of the navigable portion of the river, "thereby parting for all time with its own power to improve such navigation." *Id.* at 10.

See also Niagara Falls Power Co. v. Duryea, 185 Misc. 696, 704, 57 N.Y.S.2d 777, 784-85 (N.Y. Sup. Ct. 1945).

But cf. People v. Steeplechase Park Co., 218 N.Y. 459, 479-80, 113 N.E. 521, 527 (1916), upholding the foreshore owner's right to maintain fences, barriers, platforms, pavilions and other structures on lands under navigable waters, where the court observed: "Where the state has conveyed lands *without restriction* intending to grant a fee therein for beneficial enjoyment, the title of the grantee . . . is absolute . . . ." (emphasis added).

4.6.4.2. Limitation: Extent of Conveyance Cannot Be Too Expansive — In *Marba Sea Bay Corp. v. Clinton St. Realty Corp.*, 272 N.Y. 292, 5 N.E.2d 824 (1936), the court held that the attempted grant of practically the entire ocean front in Queens County was invalid.

In *Long Sault Dev. Co. v. Kennedy*, 212 N.Y. 1, 8-9 (1914), the court invalidated an attempt by the legislature to transfer away "control of navigation" at the Long Sault rapids of the St. Lawrence River.

In *Coxe v. State*, 144 N.Y. 396, 405, 39 N.E. 400, 401 (1895), the Court of Appeals struck down an attempted transfer by the state of all non-urban wetlands around Staten Island and Long Island, stating that "to confer title to such a *vast domain* which the state held for the benefit of the public

[is] absolutely void . . . ." (emphasis added).

4.6.4.3. Limitation: Intent to Cut Down Public Right Must Be Clear — In respect to a requirement of clarity of purpose to convey submerged lands free of the public right of passage, the court in *People v. Steeplechase Park Co.*, 218 N.Y. 459, 473-74, 113 N.E. 521, 527 (1916), quoted with approval: "[A] legislative permission to appropriate to individual use a part of the *jus publicum*, does not, *per se*, deprive the public of a right to resume the privilege granted, unless it appears that it was the intention to vest such privilege irrevocably in the licensee." (quoting *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 548 (1869). It added in the particular case, however, that "[i]f it had been [the government officers'] intention to reserve to the public a right of passage over the lands included in the grant, they would have provided therefor." *Id.* at 469 and "a grant for 'beneficial enjoyment' to a grantee, his heirs and assigns, imports a fee . . . ." *Id.* at 472. (emphasis added).

In *New York Power & Light Corp. v. State*, 230 A.D. 338, 342, 245 N.Y.S. 44, 50-51 (3d Dept. 1930), the court wrote: "Grants of gift . . . are conditional grants and are made subject to the paramount right of the state to improve the stream . . . [and] they will be construed against the grantee and, when they contain no words excluding the governmental control of the waters, they are subject to the jus publicum."

In *Langdon v. Mayor*, 93 N.Y. 129, 148 (1883), in upholding a grant of lands under tidal waters with the right to fill in derogation of the public's right, the court described the applicable distinction as follows: "[A]ll grants by the sovereign of exclusive privileges and franchises, and all gratuitous grants of land should be *strictly construed* against the grantee; but . . . the same strict rule of construction should not be applied to grants of land made for a valuable consideration . . . ." (emphasis added).

In *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 77 (1877), in which the court declared a pier over privately owned navigable waters to be a purpresture, it was said that, while the legislature may *authorize a use of tidewaters inconsistent with the public right*, the person claiming

such *must show a clear title.*

> It will *not be presumed* that the legislature intended to destroy or abridge the public right for private benefit, and words of doubtful or equivocal import will not work this consequence. Public grants . . . in impairment of public interests are *construed strictly against the grantee. . . [H]e must be able to show a clear warrant of law to support his claim.*

Id. (emphasis added). (Note: In *Langdon v. Mayor*, 93 N.Y. 129, 145-48 (1883), the court limited this rule of strict construction to *gratuitous* conveyances. *See* above.)

In *Lansing v. Smith*, 4 Wend. 9 (N.Y. 1829), it was indicated that, in a grant by the state of underwater lands *without consideration*, it being in derogation of the rights of the public, *nothing would be implied.*

See also City of Geneva v. Henson, 140 A.D. 49, 53, 124 N.Y.S. 588, 591-92 (1910) (conveyance of the bed of Seneca Lake by New York State to Massachusetts would require express language in the grant.)

4.6.4.4. Judicial Review may be Limited — In *Waterford Elec. Light, Heat & Power Co. v. State*, 208 A.D. 273, 284-85, 203 N.Y.S. 858, 870 (3d Dept. 1924), *aff'd*, 239 N.Y. 629, 147 N.E. 225 (1925) (Hudson at Van Schoenhoven rapids), the court recognized that the state could release the public "easement of passage" or grant a "right to defeat or diminish the public use," subject to limitations. But in regard to judicial review, it quoted with approval: "It is primarily for the Legislature, and not for the courts, to determine between the conflicting interests and the necessity of requiring the navigation right to yield, and its discretion will not be interfered with by the courts, except in cases of plain and gross abuse of discretion." Despite this disclaimer of judicial review authority, it went on to hold that the particular legislative grant at issue was valid, on the stated ground that "it could not materially affect navigation." *Id.* at 286.

In *James Frazee Milling Co. v. State*, 122 Misc. 545, 549, 204 N.Y.S. 645, 649 (N.Y. Ct. Cl. 1924) (Seneca River), the

court stated that the Legislature could "authorize a use [of navigable rivers] inconsistent with the public right, or interfere with the right of navigation, so far as the public is concerned, *when acting in the public interest.*" But, the court added, "[w]hether a grant or privilege is in the public interest *is for the sole determination of the Legislature.*" *Id.* (emphasis added).

In upholding the destruction, on authority from the Legislature, of a riparian owner's access by navigation over a portion of the Hudson River (subject to the tides), the court in *Gould v. Hudson River R.R.*, 6 N.Y. 523, 543 (1852), asked: "Who is to judge of the necessity for such destruction, except the sovereign power, acting through the legislature which represents it? . . . [If not the legislature], a lawsuit would be the certain consequence of every exercise of this right by the sovereign power."

4.6.5. Destruction of the Public Right of Passage by Adverse Possession — The general limitation on acquiring a private title to state lands by adverse possession is that "no time . . . can run against the state as to property which it could not grant to private individuals, such as forest lands set aside for a park." *Hinkley v. State*, 234 N.Y. 309, 315, 137 N.E. 599, 601 (1922). However, the state clearly *can* convey lands under navigable waters free of the public navigation easement (*jus publicum*). *See* 4.6.1. Thus, it should be at least theoretically possible for title free of the *jus publicum* to be acquired by prescription or adverse possession.

It should be recalled, however, that there are legal limitations on the state's power to grant the *jus publicum*, *viz.* there can be no substantial interference with navigation as a result and the grant cannot be too expansive. *See supra* § 4.6.4. No prescriptive right should be allowed to cut down the *jus publicum* if it would have been unlawful for the state to *actually* grant the claimed prescriptive right. The Court of Appeals has implicitly acknowledged the relevance of such limitations to the adverse possession context when it specifically considered the effects on navigation in upholding adverse possession title to a small streambed in the *System Properties* case, *infra*.

In *People v. System Properties, Inc.*, 2 N.Y.2d 330, 342,

141 N.E.2d 429, 434, 160 N.Y.S.2d 859, 866 (1957), the Court of Appeals observed: "Whether title by adverse possession can ever be successfully claimed as to lands actually held in trust by the State and appropriated to public uses by the State seems never to have been flatly decided by the New York appellate courts." The court then held that a private owner of a dam on a state-owned streambed had, in that case, acquired title to the streambed by adverse possession. The court made clear, however, that "the dam standing on this rocky ledge in the river is at a place where its existence . . . interferes with no public use." *Id.*

The Court of Appeals also noted that, in other situations "a grant to a private individual may not be presumed or adverse possession adjudicated as to lands theretofore appropriated to a public use by the state since such lands are inalienable. *Id. quoting Burbank v. Fay*, 65 N.Y. 57, 66 *et seq.* (1875)).

In *New York Power & Light Corp. v. State*, 230 A.D. 338, 343, 245 N.Y.S. 44, 50-51 (3d Dept. 1930), the court wrote:

> The state may unconditionally convey a valid title in the beds and waters of a navigable stream when the conveyance is made for a valuable consideration, in aid of the development of public waters for navigation and commerce or in the interests of the public, . . . *but only when it does not unduly interfere with the development of the stream for navigation and commerce. Beyond this the control of the navigable waters . . . can never be validly conveyed or lost.* (emphasis added).

The court added that "[g]rants of gift . . . are conditional grants and are made subject to the paramount right of the state to improve the stream . . . [and] they will be construed against the grantee and, when they contain no words excluding the governmental control of the waters, they are subject to the jus publicum." *Id.* These principles of construction, when a grantee cannot show that a valuable consideration was paid, would place a heavy burden upon anyone attempting to assert that the jus publicum was extinguished by prescription or adverse possession.

In *People v. New York & Ontario Power Co.*, 219 A.D.

114, 117, 219 N.Y.S. 497, 502 (3d Dept. 1927), the court wrote: "Rights in the stream which would deprive the State of its power to improve it for navigation may not be acquired by adverse possession since the State could not make such a grant."

In *Finch Pruyn & Co. v. State*, 122 Misc. 404, 409, 203 N.Y.S. 165, 170 (N.Y. Ct. Cl. 1924), the court considered the issue of whether the private claimant could have acquired a prescriptive easement to maintain its dam on the Hudson River at Glens Falls (deemed "navigable in fact"). The court concluded that the claimant had acquired a prescriptive easement in the stream despite the rule that "no prescriptive right can be sustained, when the presumed grant upon which such right is based would, if made, be unlawful."

The court in *Finch Pruyn* reasoned that "it would have been entirely competent for the Legislature at any time to have granted the claimant the right to maintain its dam where now located, *saving to the public its navigable rights in the stream.*" *Id.* at 410, 203 N.Y.S. at 170 (emphasis added). There was no interference with navigation because, at the particular point, the river "cannot be navigated by boats." 122 Misc. at 403, 203 N.Y.S. at 169. Therefore, the court concluded, "an easement [to maintain the dam] in the bed of a navigable stream may be acquired by prescription by a private individual or corporation against the state, *provided such easement does not interfere with navigation*, and could otherwise have been the subject of a lawful grant." 122 Misc. at 411, 203 N.Y.S. at 171. (emphasis added).

In *People v. Baldwin*, 197 A.D. 285, 288, 188 N.Y.S. 542, 544 (3d Dept. 1921), *aff'd*, 233 N.Y. 672 (1922), the court wrote as dictum that the state "cannot lose such lands as it holds for the public, in trust, for a public purpose, as highways, *public streams*, canals, public fair grounds." (emphasis added).

In *Fulton Light, Heat & Power Co. v. New York*, 200 N.Y. 400, 421, 94 N.E. 199, 205 (1911), it was observed that "no lapse of time will furnish a defense to an encroachment on a public right," but it nevertheless upheld a prescriptive claim to state lands on the grounds that "such possession and

right *were not inconsistent with the public right of easement.*" *Id.* at 420, 94 N.E. 205. (emphasis added).

In *Burbank v. Fay*, 65 N.Y. 57, 67 (1875), the court stated that:

> Where no express grant can be allowed, the law will not resort to the fiction of an implied grant so as to create a prescriptive right . . . . The principles thus laid down as to highways on the land, are plainly applicable to navigable waters. In the case of a river which was a public highway, twenty years' enjoyment of the water is not conclusive as to the right. And if a river ever has been a public highway, even if it should not be used as such for the period of twenty years, and during that time has been in a condition inconsistent with its use as a public highway, the public right is not extinguished if it existed previously to that time.

By analogy, the court rejected a claim to prescriptive rights in a public canal which, if allowed, "might impair or wholly destroy the use of the canal as a great public highway." *Id.* at 72.

See also:

Romart Properties, Inc. v. City of New Rochelle, aff'd, 40 A.D.2d 987, 338 N.Y.S.2d 247 (2d Dept. 1972) (title with right to fill the tidal Titus Mill Pond in New Rochelle based on "almost 250 years of adverse possession").

People v. New York and Ontario P. Co., 219 A.D. 114, 117, 219 N.Y.S. 497, 502 (3d Dept. 1927): "Rights in the stream that would deprive the State of its power to improve it for navigation may not be acquired by adverse possession because the State could not make such a grant."

Timpson v. Mayor, 5 A.D. 424, 429, 39 N.Y.S. 248, 252 (4th Dept. 1896): "Title to land under a navigable river . . . may be acquired by adverse possession or prescription against the State . . . . What may not be acquired is the right to interfere with the public right of navigation."

Commissioners of the Canal Fund v. Kempshall, 26 Wend. 404, 421 (N.Y. 1841) (implying that title by adverse possession to the bed of the Genesee River would, like title by grant, be subject to the public right of passage).

Cf. Bonert v. White, 6 A.D.2d 881, 882, 177 N.Y.S.2d 658, 659-60 (2d Dept. 1958), *modified*, 7 A.D.2d 748, 181 N.Y.S.2d 763 (2d Dept. 1958), *aff'd*, 9 N.Y.2d 956, 176 N.E.2d 202, 217 N.Y.S.2d 226 (1961): "Title to the soil of a [dry-land] highway may be obtained by adverse possession, even though it is impossible either by grant or by prescription to acquire the public's right of passage and repassage." (citations omitted) (citing waterway cases).

Chapter V.

REMEDIES FOR INTERFERENCE WITH THE PUBLIC RIGHT OF PASSAGE

5. Remedies for Interference with the Public Right of Passage — It is considered a public nuisance for private persons to obstruct, annoy or interfere with the public right of passage on a privately-owned navigable stream. As a general matter, public nuisances are actionable only by the state. A private person who seeks to abate or redress a public nuisance must be able to prove that he or she has sustained "special damage" from the nuisance.

5.1 The English Background — According to Lord Hale, under the English common law:

> [P]art of the king's jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also of smaller as barges and boats, to reform the obstructions or annoyances that are therein to such common passage *for as the common highways on land are for the common-land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges are highways by water. . .* [A]ll nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed.

Hargrave's Hale, *De Jure Maris*, ch. II and III, quoted in *Smith v. City of Rochester*, 92 N.Y. 463, 478 (1883) (emphasis added) (Hemlock Lake). The court also stated that the doctrines of Hale's Treatise "have been frequently cited with approval in our reports and are now indisputable." *Id.*

5.2. The New York Cases — In *Van Cortlandt v. New York Cent. R.R.*, 265 N.Y. 249, 262-63, 192 N.E. 401, 406 (1934) (Croton River), the court noted a limitation on the public's right to intervene in order to preserve the public's right of passage: "Special damage must be proved resulting from the public nuisance before relief will be afforded to a

plaintiff. . . ." *Id.* at 262, 192 N.E. at 406. "Even an unlawful obstruction may not be abated as a nuisance at the suit of private persons if the State does not complain, and there is no showing of special damage by the champions of the public right." *Id.* at 263, 192 N.E. at 406 (Quoting *People ex rel. Lehigh Valley Ry. Co. v. State Tax Comm'r*, 247 N.Y. 9, 16, 159 N.E. 703, 707).

In *Knickerbocker Ice Co. v. Shultz*, 116 N.Y. 382, 387, 22 N.E. 564, 565 (1889), the court wrote:

> The rights to navigate the public waters and to fish therein are public rights belonging to the People at large . . . . The riparian owner cannot interfere with such user by the public. Should he attempt to appropriate to his own use the lands under water in front of his premises, and to that end should build thereon, it would constitute a purpresture which the state could remove. (citation omitted).

But in *Knickerbocker*,

> the plaintiff could not maintain an action for its abatement. A purpresture is an invasion of the right of property in the soil while the same remains in the People. A nuisance in such a case as this must be an injury to the common right of the public to navigate the waters. [citation omitted] And these questions can only be tested in an action at the suit of the People.

Id. at 389, 22 N.E. at 565 (citations omitted).

In *In Re Comm'rs of State Reservation*, 37 Hun. 537, 550 (N.Y. Sup. Ct. 1885), the court stated: "A public nuisance is an injury to the *jus publicum* . . . ." It held, however, that a dam is not a public nuisance if, at the particular location, the river cannot be navigated anyway.

In *Morgan v. King*, 35 N.Y. 454, 455 (1866), an action by lower riparian owners for obstruction of the Racquette River, the court said that if the river was, "of public right, a common highway, at the point where its waters are obstructed by the defendants' dam . . . they are liable for detaining the plaintiff's logs in their passage down stream." (The Racquette was,

however, found *not* to be a public highway at the relevant point.)

In *People v. Vanderbilt*, 26 N.Y. 287, 293 (1863), an action to remove an obstruction to navigation in the (tidal) Hudson River, the court made the following distinction:

> A purpresture is an invasion of the right of property in the soil, while the same remains in the king or the people. A nuisance is an injury to the *jus publicum*, or common right of the public to navigate the waters . . . If the injury complained of be a purpresture, it may be abated and removed at suit of the attorney-general . . . irrespective of any damage which may accrue. But where the action is to remove a nuisance, which is not shown to be a purpresture, a nuisance in fact must in all cases be shown to exist.

In *Ex parte Jennings*, 6 Cow. 513, 528 (N.Y. Sup. Ct. 1826), the court wrote: "If [a riparian owner] make any erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance." [Quoted in *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 185 (1880) and *Smith v. Rochester*, 92 N.Y. 463, 484 (1883).]

In *Palmer v. Mulligan*, 3 Cai. R. 307, 319 (1805), Chancellor Kent wrote: "The *Hudson* at *Stillwater* is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a public highway for public uses, such as that of rafting lumber . . . . To obstruct this or any other uses of the river, by dams &c., would be a nuisance . . . ." (emphasis in original).

Cf. People v. System Properties, 2 N.Y.2d 330, 345, 141 N.E.2d 429, 435-36, 160 N.Y.S.2d 859, 868 (1957), in which the Court of Appeals considered the right of private claimants to have a dam removed as a "nuisance". The court wrote that the claimants "would have no absolute right to a mandatory injunction against the dam. Denial thereof would be discretionary with the court." (citation omitted).

Stiles v. Hooker, 7 Cow. 266, 268 (1827). (When sued for injuries to plaintiff's claim, defendant cannot raise the argument that the plaintiff's claim is a public nuisance as a defense.)

Chapter VI.

"TAKINGS" IMPLICATIONS

6. "Takings" Implications of Legislation Relating to the Public Right of Passage — The cases make clear that a compensable taking occurs only if the effect of a legislative enactment is to impose some *new* legal burden on landowners. Indeed, under the so-called *police power* to regulate property uses, even new legal burdens can be imposed, so long as the economic impact on landowners is comparatively insubstantial. No compensation is required in any event, however, if the Legislature merely reaffirms or ratifies existing legal burdens on the land.

Legislative enactments dealing with the public right of passage may raise "takings" or just-compensation issues of two distinct kinds:

1.Would a compensable taking occur if the Legislature declares a public right of passage to exist on streams or other water bodies which were not previously subject to the common-law public right of passage?

Answer: yes, according to several New York cases. *See infra* § 6.2.2. The reason is that declaring a public right to use new streams, not "navigable in fact" at common law, would impose new legal servitudes on landowners. This point is a bit tricky, however, because the common law is itself not static. In particular, its definitions of "navigable in fact" have been expanded somewhat over the years. *See supra* §§ 2.3.1. and 2.4.3. Moreover, changes in customary uses, modes of transport and boating technology may also affect the usability of particula.r streams for navigation and, hence, their navigability in fact. With these qualifications, however, the answer to the first question is generally yes.

2.What would be the takings implications of legislation giving boaters a right to make minimal necessary use of the bottoms and shores of "navigable in fact" streams, i.e., uses that are inseparable from safe passage itself?

Answer: None, for two reasons.

First, despite the absence of direct holdings, the cases are

solidly consistent with the view that the common-law public right of passage has always included a right to do that which is reasonably necessary to accomplish passage, including minimum-impact excursions on shore as necessary to safely pass by obstacles to navigation. *See supra* § 4.5.

Second, even if on-shore ancillary rights were not deemed part of the common-law right of passage, both the federal and state cases recognize that the Legislature can create such rights as an exercise of the police power, provided that the interference with private owners' "investment-backed expectations" is transitory and minimal. *See infra* §§ 6.2 and 6.3.

In questions of takings, both federal and state constitutional principles must be considered. *See infra* § 6.2.

6.1. Federal Constitutional Considerations — The United States Supreme Court has held that a private landowner's right to exclude others is "universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). With that in mind, the Court in *Kaiser Aetna* struck down an attempt by the federal government to extend the federal navigation servitude to a previously non-navigable pond (which the owner had dredged and connected with the sea).

It is not, however, every government impingement on the owner's "right to exclude" that results in a compensable taking. Only a few months after *Kaiser Aetna*, for example, the Supreme Court upheld a state law which required shopping center owners to permit demonstrators into the shopping center in order to express their views. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Acknowledging that even a property right so fundamental as the right to exclude others can be subjected to modification, one of the justice's observed that if "common law rights were . . . immune from revision . . . [it] would freeze the common law as it has been constructed by the courts, perhaps at its 19th century state of development." *Id.* at 93 (Marshall, J. concurring).

The Supreme Court's main opinion in the *PruneYard* case stated that the *Kaiser Aetna* case was "quite different". Of *Kaiser Aetna*, the Court wrote, the private owners "had invested substantial amounts of money in dredging the pond,

developing it into an *exclusive* marina [which was to be] open only to fee-paying members, and the fees were paid in part to 'maintain the privacy and security of the pond.' " 447 U.S. at 84 (quoting *Kaiser v. Aetna*, 444 U.S. at 168. (emphasis added)). The government's attempt to exploit the product of these expenditures without payment "interfered with Kaiser Aetna's '*reasonable investment backed expectations.*' " *Id.* (emphasis added). By contrast, in the shopping center case, the private owners "failed to demonstrate that the 'right to exclude others' is so *essential to the use or economic value* of their property that the state-authorized limitation of it amounted to a 'taking.' " *Id.* (emphasis added).

All in all, the facts of the *PruneYard* (shopping center) case appear to be far closer to the "takings" questions at hand than the facts of *Kaiser Aetna*. The average stream-side owner has neither invested in waterway improvements (such as the dredging in *Kaiser Aetna*) nor created any other amenity which passage and its incidents need utilize. In *Kaiser Aetna*, the government was, in effect, trying to capture a privately created facility and give it to the public, thereby depriving the owner of its expected reward. By contrast, the average stream-side owner's only investment that is touched upon in passage is the investment in the landbase itself, the same as in *PruneYard*. Also like *PruneYard*, and unlike *Kaiser Aetna*, the minimum shore use incidental to passage would have only a negligible economic impact on the landowner.

In sum, the federal constitutional case law clearly permits state legislation to authorize minimal, transitory, low-impact use by the public of private land. The conclusion follows that the United States Constitution would not prevent inclusion of minimal bottom and shore use as part of a legislative public right of passage, even if such uses were to be considered a new, albeit insubstantial, legal burden on riparian landowners.

6.2. New York Takings Cases — More than a century before the *Kaiser Aetna* decision, the New York Court of Appeals held that the Legislature cannot *ipse dixit* declare streams to be public highways if they previously were not, except on payment of just compensation. *Morgan v. King*, 35

N.Y. 454 (1866). If the state's just compensation requirement is more stringent than the federal constitutional requirement, the state's requirement controls: "The courts of this State have determined these rules of property [in streams] and have decided what the State must pay, and when, in the instances of its seizure of water power rights for purposes of navigation. In these questions the United States has no concern." *Waterford Elec. Light, Heat & Power Co. v. State*, 208 A.D. 273, 288, 203 N.Y.S. 858, 873 (3d Dept. 1924), *aff'd*, 239 N.Y. 629, 147 N.E. 225 (1925) (taking water power Hudson at Van Schoenhoven rapids: compensable). In other words, if New York's common law public right of passage is less extensive than the federal navigation servitude, the state may have to pay just compensation for a given imposition on private owners even though the Federal government would not. *Accord Appleby v. City of New York*, 271 U.S. 364, 399-400 (1926).

Based on the New York cases, it is clear that no taking occurs when the Legislature merely declares or asserts state authority over a stream that is "navigable in fact", unless the *jus publicum* has been previously conveyed. *See infra.* It is equally clear that the Legislature cannot extend the public right of passage to streams not covered by the common law public right without paying just compensation.

The New York cases provide no direct insight on the "takings" implications of legislation declaring that the public right of passage includes necessary incidental uses of stream bottoms and adjacent shorelands. There is, however, no reason to assume that the New York constitutional law is different from the federal constitutional law on this point. *See supra* § 6.1. Indeed, the New York Court of Appeals is, if anything, even *more* willing than the U.S. Supreme Court to uphold legislation authorizing small scale, low-impact physical utilization of private land. A forced easement for cable TV lines upheld under the police power "in view of the *minimal nature of the invasion* and the absence of any reasonable expectation . . . that the space thus utilized (or invaded) would ever be income productive." *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 155, 423 N.E.2d 320, 336, 440 N.Y.S.2d 843, 859 (1981), *rev'd*, 458 U.S. 419 (1982). The

New York cases do not provide any reason to believe that a new legal burden on landowners would be created by legislative authorization of incidental use as is necessary to accomplish safe passage. *See supra* § 4.5.

6.2.1. If State Acting Within its Navigation Powers: No Taking —

> The doctrine must be regarded as settled that whatever the rights of the owners of lands bordering upon, or within the waters of, a navigable river, they must yield when the powers of government are called into exercise for a general public benefit in the improvement of navigation. . . . [The individual] can have no private rights in the river, which are exempt from the requirements of a public or governmental necessity.

Slingerland v. International Contr. Co., 169 N.Y. 60, 70, 61 N.E. 995, 997 (1901).

"[W]hen [gratuitous grants from the state] contain no words excluding the governmental control of the waters, they are subject to the *jus publicum*. When the state assumes control of the stream . . . it does not take property within the meaning the Constitution." *New York Power & Light Corp. v. State*, 230 A.D. 338, 343, 245 N.Y.S. 44, 50-51 (3d Dept. 1930) (Mohawk River).

"The Legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving, and protecting the public easement." *People ex rel. New York, O. & W. Ry. v. State Tax Comm'n*, 116 Misc. 774, 776, 191 N.Y.S. 464, 466 (N.Y. Sup. Ct. 1921) (analogizing the Susquehanna River with the Chenango River, "a fresh-water stream . . . [and] therefore a private river." *Id.*).

> The proprietary interest of the riparian owner is subordinate to the public easement of passage and . . . the legislature may direct the performance of acts by state officers, which tend to promote the public right of passage and transportation, without subjecting the state to liability. When, however, . . . land is taken and the river waters

> are diverted for the purpose of constructing and operating some other channel distinct from that of the river [*viz.* a canal], then the limit of the state's [navigation-easement] authority . . . has been reached.

Fulton Light, Heat & Power Co. v. New York, 200 N.Y. 400, 418, 94 N.E. 199, 204 (1911) (rejected the state's argument that it was not liable for damages to riparian owners when it appropriated streambed and waters in building a separate canal.)

In *Chenango Bridge Co. v. Paige*, 83 N.Y. 178, 185 (1880), after first referring to the Chenango River as the "private property of the riparian owners," the Court of Appeals said: "The Legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for purpose of regulating, preserving and protecting the public easement." (Quoted in *Smith v. Rochester*, 92 N.Y. 463, 485 (1883)).

6.2.2. Stream Must Be Navigable in Fact, or Else a Taking Results —

> The rule is that a state Legislature has the power to appropriate by force of its own enactment any flowing stream to the use of the public as a highway, subject, however, to the qualification that if a stream is not in fact navigable, a statute declaring it to be navigable will not make it so in law as against the pre-existing rights of riparian owners, unless compensation is made to such owners for the value of the rights so destroyed or injured.

People ex rel. New York, O. & W. Ry. v. State Tax Comm'n, 116 Misc. 774, 778, 191 N.Y.S. 464, 468 (N.Y. Sup. Ct. 1921) (citation omitted) (Susquehanna River).

> The statutes declaring the Genesee river navigable were enacted after the State had parted by grant with the title to the shores and bed of the river. (citation omitted) The State could not by means of such statutes diminish or destroy without compensation rights of property of the riparian owners derived from such grant (citation omitted).

People ex rel. Western New York & P. Ry v. State Tax Comm'n, 244 N.Y. 596, 597, 155 N.E. 911, 912 (1927).

In *Morgan v. King*, 35 N.Y. 454, 457 (1866), in relation to a statute declaring the Racquette River to be a "public highway", the court wrote:

> [I]t does not provide compensation for taking private property of the owners of the banks and the bed of the stream. If, prior to the passage of the act, the stream was private, in use as in property, *the legislature could not take away the rights of those who were then riparian owners, nor subject such rights to public use, created or authorized by the act itself, without compensation.* (emphasis added).

In *Brown v. Scofield*, 8 Barb. 239, 242 (Sup. Gen. T. 1850), an action for obstructing a public river with a dam, the court rejected a takings challenge against a statute which declared the Canisteo River to be a public highway, saying: "The statute did not create the [public] right; it only declared what existed before, and by common law. There was no attempt made, on the trial, to dispute the right of the public to use the river as a highway at common law."

But cf.:

Curtis v. Keesler, 14 Barb. 511, 519 (N.Y. Sup. Ct. 1852), it was stated that there was a public right of passage on the Delaware River bounding Sullivan County and on the Beaverkill, despite the fact that neither was capable of floating boats, rafts or logs "unless swelled by freshets", on the grounds that "those streams have been declared public highways by statute." The suggestion, at least, is that a statutory declaration that a stream is a public highway *may* not necessarily run afoul of the just compensation requirement.

On the effect of a legislative declaration that certain stream and lake waters are "public highways for the purpose of floating logs, timber and lumber down those streams," the court in *Brant Lake Shores, Inc. v. Barton*, 61 Misc. 2d 902, 907, 307 N.Y.S.2d 1005, 1012 (N.Y. Sup. Ct. 1970), said "[n]or does [the enactment]. . . give anyone a greater right to the use of the waters of Brant Lake than one had prior to such

designation."

Other Cases:

Langdon v. Mayor, 93 N.Y. 129, 161 (1883) (grant of wharfage could not be destroyed by cutting off wharf owner's water access to the sea without compensation).

6.2.3. If State Has Conveyed the *Jus Publicum*: Taking Results — In *Appleby v. City of New York*, 271 U.S. 364, 399 (1926), the Supreme Court said that, once the *jus publicum* has been conveyed, "the city [or state] can only be revested with them by a condemnation of the rights granted." Thus, the city, having conveyed the underwater lands with right to fill, could not now dredge the lands in aid of navigation under the *jus publicum*.

In *First Constr. Co. of Brooklyn v. State*, 221 N.Y. 295, 316, 116 N.E. 1020, 1026 (1917), an action for just compensation for a taking of lands under tidal waters of Gowanus Bay, the court wrote: "[A]n act granting the right to fill in lands under water, and thereby acquire title to the same, gives an inchoate, vested interest in the lands described which is a property right and . . . the grantee cannot be deprived without compensation."